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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 514

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COUNTY OF LOS ANGELES, A BODY POLITIC AND CORPORATE

*Appellant,*

*vs.*

SOUTHERN CALIFORNIA TELEPHONE COMPANY.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

---

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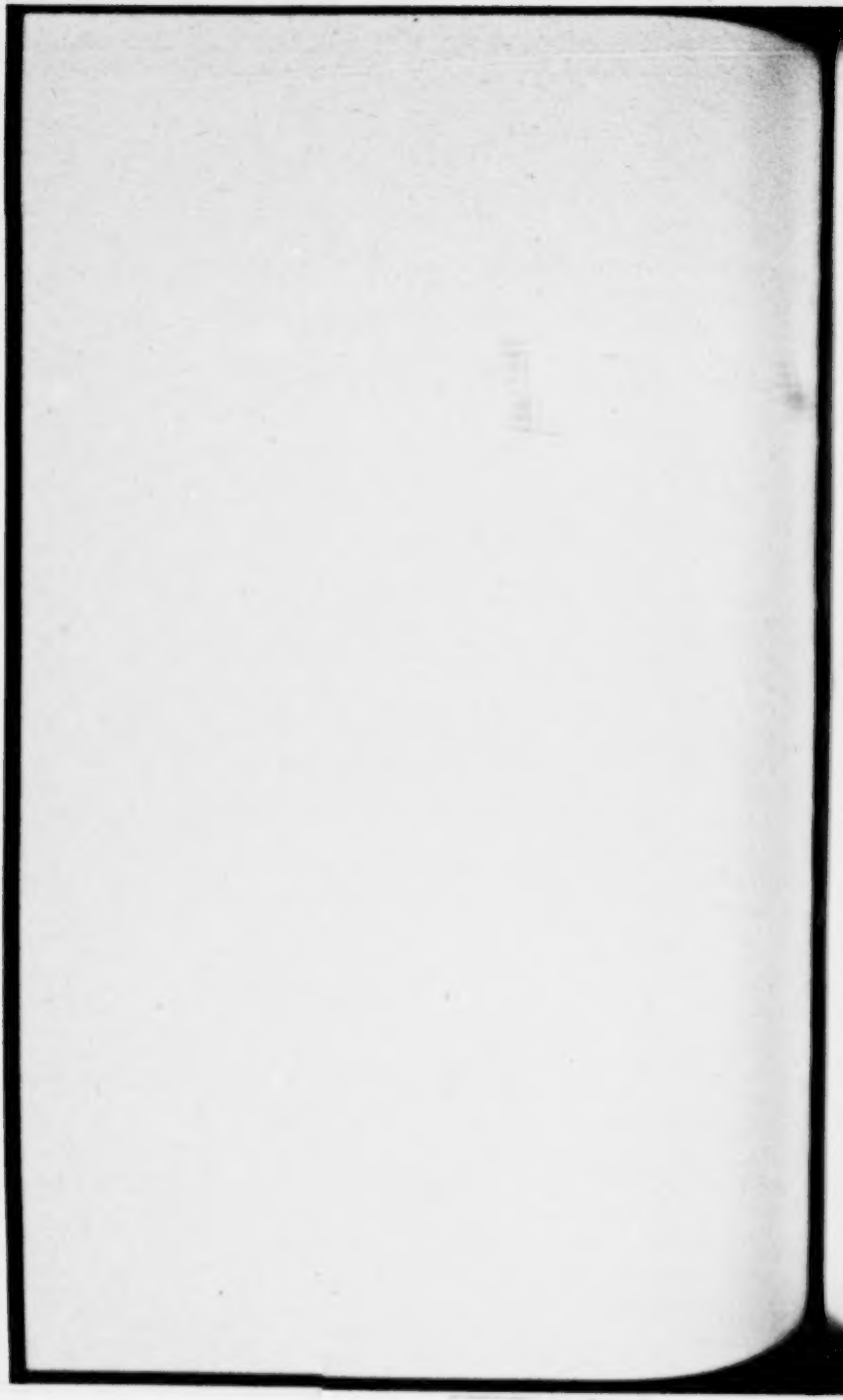

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1948**

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# No. 514

COUNTY OF LOS ANGELES, A BODY POLITIC AND CORPORATE

*Appellant,*

*vs.*

SOUTHERN CALIFORNIA TELEPHONE COMPANY, A CORPORATION,

*Appellee.*

---

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

---

Appellant county brought this suit to enjoin appellee telephone company for maintaining its lines in the public streets and highways of the county unless and until appellee should have procured a county franchise, and for an accounting and money judgment. In answer, appellee asserted as defenses that its franchise from the state under section 536 of the California Civil Code [1] is a vested right

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[1] "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

and contract secure against impairment, that the decisions of the Supreme Court of the State of California confirming over many years appellee's right to a franchise under that section constitute a rule of property, and that the county is barred by estoppel and laches. At the trial appellant's sole contention was that section 536 violated the California constitutional provisions forbidding appropriations and grants, without consideration, of the state's funds or property for specified private purposes.[2] The superior court rendered interlocutory and final opinions overruling appellant's contentions, found the statute valid and appellee possessed of a state franchise under it, found that appellant was estopped to assert the contrary, concluded inter alia that the state court decisions constituted a rule of property in appellee's favor, and gave judgment for appellee.[3] No question under the equal protection clause

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[2] Art. IV, sec. 22:

"No money shall be drawn from the treasury but in consequence of appropriation made by law, and upon warrants duly drawn thereon by the Controller; and no money shall ever be appropriated or drawn from the State treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a State institution, nor shall any grant or donation of property ever be made thereto by the State; * * *."

Art. IV, sec. 31:

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; * * *."

[3] Copies of these opinions and of the court's findings and conclusions of law are appended to this statement. See particularly Findings XX-XXIII, XXIV-6, XXVa, and Conclusions of Law I-V, VII, VIII, X.

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of the Federal Constitution was raised or decided, or even intimated.

Appellant appealed to the Supreme Court of the State of California, which transferred the case to the district court of appeal for hearing and decision. That court affirmed the judgment; its opinion is unofficially reported at 74 Advance California Appellate Reports 97, 168 Pacific Reporter, Second Series 207, and a copy thereof is appended to this statement. No question under the equal protection clause was raised or decided.

On June 18, 1946, the Supreme Court of the State of California granted a hearing of the case. After argument (during which no question under the equal protection clause was raised) and submission for decision, the Supreme Court on February 11, 1947, set aside the submission and invited briefs and argument on two questions of state law, namely, whether section 536 had been impliedly repealed by another California statute passed at the same session of the legislature, or whether the other statute so qualified section 536 as to require franchise payments to the county.[4] Following resubmission, the court on December 2, 1947, again set aside the submission and requested briefs and argument on a new set of questions, inviting consideration of the equal protection clause and of the standing of either party to raise the constitutional question of discrimination.[5] This was the first time any question

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[4] "1. Was section 536 of the Civil Code repealed by the Broughton Act? In this connection, the court desires to give further consideration to the holding in County of Inyo *v.* Hess, 53 Cal. App. 415.

"2. Can effect be given to both section 536 of the Civil Code and the Broughton Act by construing section 536 as an offer by the State of rights which a county may not deny, but for which a county may make a charge as provided in the Broughton Act?"

[5] "1. If, in order to reconcile Civil Code Sec. 536 and the Broughton Act, Sec. 536 is construed to apply only to telegraph and telephone *corporations* and not to *individuals* (see County of Inyo *v.* Hess, 53 C.A. 415, 423), would there be an unconstitutional discrimination and denial of

under the equal protection clause had been raised or suggested in the case.

After argument on these questions, the Supreme Court on August 13, 1948, affirmed the judgment of the superior court, with one of the seven judges dissenting. The court considered and rejected the suggestion that Section 536 of the California Civil Code violated the equal protection clause, holding that there was ample justification for the legislative classification of corporations, recognizing that the statute had been accepted as valid for many years and that vast sums had been invested in reliance on the rights granted thereby, and finding no such compelling and cogent reasons as would warrant the disturbance of its own many prior decisions upholding the constitutionality of the statute, which had become "something akin to a rule of property." On September 8, 1948, the court modified its opinion in a respect not material here. Appellant appeals, assigning error only in the holding that Section 536 does not violate the equal protection clause.

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equal protection of the laws, on the ground that only an individual and not a corporation would have to pay a franchise fee to use the highways, or that, regardless of payment of fees, the privilege to use the highways is granted only to corporations and not to individuals?) See Frost v. Corporation Com., 278 U. S. 515.) Is there any basis for a holding that there was a reasonable classification or that it was justifiable under police power?

"2. Have either of the parties to this action the proper standing to raise the constitutional question of discrimination, or can this question be raised only by an individual who has been harmed?

"3. Assuming that there would be unconstitutional discrimination under the above construction of the statutes, would Sec. 536 alone be unconstitutional or would both Sec. 536 and the Broughton Act, insofar as it applies to telephone lines, be unconstitutional? (Compare Speegle v. Board of Fire Underwriters, 29 Cal. (2d) 34, 47-48, and cases there cited.)

"4. If both Sec. 536 and the Broughton Act are unconstitutional, insofar as telephone franchises are concerned, is there any other statutory authority which would permit the county to impose the franchise fees involved here?"

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Appellee states the following matters and grounds making against the jurisdiction of this Court:

1. Appellant is a political subdivision of the State of California [6] and as such has no standing to challenge the validity under the Federal Constitution of the state statute here involved or the legislative classification which the state has made therein.

*Pawhuska* v. *Pawhuska Oil Co.* (1919), 250 U. S. 394;
*Trenton* v. *New Jersey* (1923), 262 U. S. 182, 188;
*Risty* v. *Chicago, R. I. & Pac. Ry. Co.* (1926), 270 U. S. 378, 390;
*Williams* v. *Mayor* (1933), 289 U. S. 36, 40;
*Los Angeles* v. *Los Angeles County Flood Control District* (1938), 305 U. S. 564;
*Twin Falls County* v. *Henderson* (1938), 305 U. S. 568;
*City and County of Denver* v. *Colorado* (1939), 307 U. S. 615;
*Texas* v. *City of Houston* (1944), 322 U. S. 711;
*Monaghan* v. *Armatage* (1945), 323 U. S. 681.

2. Appellant's sole attack upon the constitutionality of Section 536 is that the statutory grant of a franchise tendered by that statute is limited to telephone and telegraph corporations and does not include individuals or partnerships. Appellant is not a member of the class asserted to be thus discriminated against. No one can assail the validity of a statute on the ground that it impairs the constitutional rights of others.

*Hatch* v. *Reardon* (1907), 204 U. S. 152, 160-161;
*The Winnebago* (1907), 205 U. S. 354, 360;

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[6] California Constitution, Art. XI, secs. 1, 3, and 7½;
*County of Los Angeles* v. *Riley* (1936), 6 Cal. 2d 625, 627-628;
*County of Los Angeles* v. *Graves* (1930), 210 Cal. 21, 25;
*County of Tulare* v. *City of Dinuba* (1928), 205 Cal. 111, 117;
*Reclamation District* v. *Superior Court* (1916), 171 Cal. 672, 679-680,
*Central Pac. Ry. Co.* v. *Costa* (1927), 84 Cal. App. 577, 586-588.

*Hampton* v. *St. L., Iron Mt. & S. Ry.* (1913), 227 U. S. 456, 468-469;
*Mallinckrodt Works* v. *St. Louis* (1915), 238 U. S. 41, 54;
*Heald* v. *District of Columbia* (1922), 259 U. S. 114, 123;
*First Nat. Bank* v. *Tax Comm'n* (1933), 289 U. S. 60, 65;
*Henneford* v. *Silas Mason Co.* (1937), 300 U. S. 577, 583.

3. A party asserting unconstitutional discrimination has the burden of proving actual and injurious, not hypothetical, discrimination, and of negativing every conceivable basis which might support the legislative classification. The presumption of constitutionality can be overcome only by factual demonstration that the classification oppressively discriminates against particular persons and classes.

*Weaver* v. *Palmer Bros. Co.* (1926), 270 U. S. 402, 410;
*O'Gorman & Young* v *Hartf'd Ins. Co.* (1931), 282 U. S. 251, 257-258;
*Detroit Brigde Co.* v. *Tax Board* (1932), 287 U. S. 295, 297-298;
*Borden's Co.* v. *Baldwin* (1934), 293 U. S. 194, 209;
*Metropolitan Co.* v. *Brownell* (1935), 294 U. S. 580, 584;
*Pacific States Co.* v. *White* (1935), 296 U. S. 176, 185;
*Madden* v. *Kentucky* (1940), 309 U. S. 83, 88.

There is no evidence or other showing of discrimination in the case at bar. The record contains no hint that any individual or partnership has attempted or proposed the construction of a statewide telephone system like that operated by appellee, or has ever sought or been denied a franchise therefor on equal terms with appellee or on any terms. In the absence of such factual showing, this Court has nothing before it upon which to base a judgment of unconstitutional discrimination.

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The inequality necessary to justify setting the statute aside for unconstitutional discrimination must be actual, not conjectural, hypothetical or sporadic.

*Hatch* v. *Reardon* (1907), 204 U. S. 152, 160;
*Williams* v. *Mayor* (1933), 289 U. S. 36, 42-43;
*First Nat. Bank* v. *Tax Comm'n* (1933), 289 U. S. 60, 64-65;
*Morf* v. *Bingaman* (1936), 298 U. S. 407, 412-413.

4. The Federal question asserted by appellant is unsubstantial. The reasonableness of separate classification of corporations for the conduct of particular functions and businesses, and particularly those tinged with importance to the public, is so well settled as no longer to be an open question.

*Noble State Bank* v. *Haskell* (1911), 219 U. S. 104;
*Shallenberger* v. *First State Bank* (1911), 219 U. S. 114;
*Assaria State Bank* v. *Dolley* (1911), 219 U. S. 121;
*Engel* v. *O'Malley* (1911), 219 U. S. 128;
*Crescent Oil Co.* v. *Mississippi* (1921), 257 U. S. 129, 137;
*Prudential Ins. Co.* v. *Cheek* (1922), 259 U. S. 530, 546;
*Chicago, R. I. & Pac. Ry.* v. *Perry* (1922), 259 U. S. 548, 556;
*Dillingham* v. *McLaughlin* (1924), 264 U. S. 370;
*Lawrence* v. *State Tax Comm.* (1932), 286 U. S. 276, 283-284;
*Phillips Petroleum Co.* v. *Jenkins* (1936), 297 U. S. 629;
*Hammond Packing Co.* v. *Arkansas* (1909), 212 U. S. 322, 349;
*Aluminum Co.* v. *Ramsey* (1911), 222 U. S. 251, 255-256;
*German Alliance Ins. Co.* v. *Kansas* (1914), 233 U. S. 389;
*Mallinckrodt Works* v. *St. Louis* (1915), 238 U. S. 41, 55-56.

The majority holding in *Frost* v. *Corporation Commission* (1929), 278 U. S. 515, the only case cited in opposition, was correctly distinguished by the Supreme Court of the State of California in the case at bar. The dissenting opinion of Justice Brandeis in that case, concurred in by Justices Holmes and Stone, is undoubtedly, as the cases above cited show, the established rule of this Court.

The California legislature was entitled to consider (and in the absence of any factual showing in the record to the contrary must be presumed to have considered) facts which sustain the classification embodied in the statute. The many facts justifying such classification are familiar and well recognized; as the California Supreme Court said in the case at bar (Appendix to typewritten Statement as to Jurisdiction, pp. 24-25):

> "There is ample justification for treating corporations differently from individuals in granting franchises for the operation of telephone and telegraph systems, and there is a reasonable basis for the classification of corporations as the sole recipients of the grant offered in section 536. Corporations are in a better position than individuals to finance and carry on statewide projects of this nature, they are more easily regulated and supervised, and they have much greater permanency of existence and can give better assurance of uninterrupted service. It may be that one of the purposes of section 536 was to promote the establishment of statewide communication systems, and the use of corporate ownership and management may have been considered the best method of achieving that purpose."

Though statutes similar to Section 536 and applying to telephones and telegraphs, or to railroads, have existed for many years in most of the states of the Union, no case has been found in which such a statute was held unconstitutional on the ground of improper discrimination; on the contrary,

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where the objection has been raised, the power to limit the granting of franchises has been upheld (Appendix to typewritten Statement as to Jurisdiction, p. 25).

As a practical matter, individuals are not discriminatorily burdened by Section 536 of the California Civil Code. Anyone can obtain all the benefits of that section through the simple expedient of incorporating as a telephone or telegraph corporation.

*Weed* v. *Bergh* (1910), 141 Wis. 569.

5. The decision below rests upon adequate non-federal grounds. The superior court found that appellee has spent vast sums in reliance upon many judicial decisions [7] upholding the validity of Section 536 of the California Civil Code and upon the rights granted thereby.[8] Both the superior court and the supreme court of California have declared [9] that appellee has the protection of these decisions as a rule of property, a state ground of decision binding upon this Court.

*Tyler* v. *United States* (1930), 281 U. S. 497, 501;
*United States* v. *Title Ins. Co.* (1924), 265 U. S. 472, 486;
*Warburton* v. *White* (1900), 176 U. S. 484, 496.

The superior court also found that by a long course of conduct in many aspects, appellant is estopped to assert that appellee has not a valid franchise under Section 536 of

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[7] *Western Union Tel. Co.* v. *Visalia* (1906), 149 Cal. 744, 747;
*Western Union Tel. Co.* v. *Los Angeles* (1911), 160 Cal. 124, 126;
*Postal Tel. Cable Co.* v. *Los Angeles* (1911), 160 Cal. 129, 130;
*Postal Telegraph-Cable Co.* v. *Los Angeles* (1912), 164 Cal. 156, 160;
*County of Inyo* v. *Hess* (1921), 53 Cal. App. 415, 422, 425;
*Postal Tel.-Cable Co.* v. *Railroad Com.* (1927), 200 Cal. 463, 472-474;
*City of Salinas* v. *Pacific Tel. & Tel. Co.* (1946), 72 Cal. App. 2d 494, 497.

[8] Finding XXIII, Appendix to this Statement, p. 66.

[9] Conclusion of Law VII; Appendix to this Statement, p. 78; Appendix to Statement as to Jurisdiction, p. 27.

the California Civil Code.[10] The Supreme Court of California affirmed the judgment of the trial court without qualification and in its opinion recited the facts found and relied upon by that court as establishing this defense.[11] Estoppel to challenge the constitutionality of a statute is an adequate nonfederal ground to sustain the judgment.

*Enterprise Irrig. Dist.* v. *Canal Co.* (1917), 243 U. S. 157, 162-165;

*Utley* v. *St. Petersburg* (1934), 292 U. S. 106, 111, 112;

*Hale* v. *Lewis* (1901), 181 U. S. 473, 479;

*Mobile, Jackson, etc., R. R. Co.* v. *Mississippi* (1908), 210 U. S. 187, 204;

*Bell Telephone Co.* v. *Van Dyke* (1935), 296 U. S. 533.

On the foregoing matters and grounds making against the jurisdiction of this Court, appellee moves the court to dismiss with costs the appeal taken herein.

And appellee moves this Court in the alternative to affirm the judgment from which the appeal is taken on the grounds that if this Court should determine that it has jurisdiction in the premises, nevertheless the federal question raised by appellant is not substantial and there are adequate nonfederal grounds to sustain the judgment appealed from.

Dated, San Francisco, California, December 13, 1948.

Respectfully submitted,

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[10] Findings XX-XXIII; conclusion of Law VIII; Appendix to this Statement, pp. 49-66; 79.

[11] Appendix to Statement as to Jurisdiction, p. 30.

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## APPENDIX "A"

(Title of Court and Cause)

No. 410067

DECISION ON QUESTION WHETHER OR NOT C. C. 536 IS CONSTITUTIONAL

It is hardly necessary for me to say that I have profound respect for the ability of both counsel who have argued the question whether or not section 536 of the Civil Code is constitutional. Were the three of us, all from a disinterested point of view, to deal with a problem requiring much thought, and were my own conclusion to differ from that of either of counsel, I would suspect the correctness of my own analysis and deductions, and would re-examine with much care the mental processes by which I had come to that conclusion.

In respect to the question now before me I have one advantage over counsel, and I am inclined to believe that it compensates for such advantages as they may have over me. I am on the side lines, in the neutral section, with the perspective that comes from disinterestedness. They are advocates, each exceedingly loyal to his client as he ought to be.

At the outset I would express agreement with Mr. Prichard in this, that if section 536 of the Civil Code is unconstitutional, or if this court believes it to be unconstitutional, it is the duty of this court to so declare, regardless of express or implied contrary holdings of higher courts, unless the ultimate futility of such a ruling by the trial court might be so evident as to show that its only effect would be the prolonging of litigation.

Every judge of this state has taken his oath to support the constitutions, federal and state, and even the usually beneficial and necessary principle of *stare decisis* must yield to that oath.

But I do not agree with Mr. Prichard in his observation that the higher courts of this state never have passed on the question of constitutionality of that section. Because of the oath I have mentioned, and because of the principle of constitutional government under which our courts exist,

even were no formal oath taken by the judges, whenever any court enforces an act of the legislature or gives a remedy under such an act, it thereby rules that the act is constitutional. This ruling is as effective as if expressly stated. If made without the point having been raised in argument, it may be in error, or, whether right or wrong, it may be different from the ruling that would have been made had there been argument, but it is no less a decision on a question that always is at issue whenever any litigant claims a right or remedy under a statute. A court cannot excuse itself for enforcing an unconstitutional act of the legislature by saying that counsel in the case did not raise the question of constitutionality. It is the sworn duty of the court, itself, to be vigilant in guarding the Constitution, and it must be presumed that that duty has been fulfilled according to the light and ability of the judges.

In each of the ten cases cited by plaintiff's counsel on page 2 of the trial memorandum, the higher court, being the Supreme Court of this state in nine of such cases, held that section 536 of the Civil Code is constitutional. None of the cases cited by plaintiff's counsel on page 5 of the trial memorandum involved a question of constitutionality of a statute. Although, as I have said before, the oath of this judge to uphold the Constitution is paramount to the principle of *stare decisis*, still the prestige of a long succession of decisions by the highest court of the state, uniformly holding an act to be constitutional, ought to command respect and ought not to be ignored except under the most earnest and most carefully reached conviction that the high court has erred and that a resulting injustice needs correction. It may be that section 536 is so free from suspicious characteristics that it has not suggested a question of constitutionality to even one of the learned justices in even one of the many cases involving its application. Or it may be that the question has been raised in the mind of the court and has been discussed and thoroughly considered, although not commented on in any opinion because not argued. Regardless of which possibility may be the fact, the fact is significant.

For some years after the adoption of the Federal Constitution a question heatedly argued was whether Congress or the Supreme Court had the ultimate authority to decide

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whether or not an act of Congress was constitutional. There was a good deal of logical force in the contention that so important an authority ought to abide with Congress, rather than with a few justices, and that Congress ought to be not only primarily but ultimately responsible for upholding and obeying the Constitution.

Although the question finally was decided by the Supreme Court in favor of the Supreme Court, nevertheless the view that the legislative body maintains over a long period of time as to the constitutionality of a particular act is a fact of significance. For sixty-five years since the Constitution of 1879 was adopted, section 536 of the Civil Code has been recognized by the California legislature as a valid constitutional enactment. This recognition was emphasized when by the Statutes of 1905, the act was repealed to be re-enacted so as to include telephone as well as telegraph corporations and to bear a new title.

When to the foregoing facts we add the fact that in other jurisdictions statutes similar to Civil Code 536 have been held to be constitutional against constitutional provisions similar to ours, it will be evident that the plaintiff in this case is petitioning this court to take a boldly original step. Although the position in which such a plea places the judge of this department is neither a novel nor fearful one for him to be in, all the precedent and prestige standing against the plaintiff do advise the court to insist that the burden of persuasion be clearly fulfilled by the plaintiff.

It seems trite to say that the Constitution may not violate itself. When different provisions appear to be contradictory, some reconciliation must be found, for we have no authority to allow either of such provisions to fall. The constitution must be consistent within itself.

The Constitution of 1879 contained a section, section 19 of Article XI, which did for privately owned water and gas companies what C. C. 536 does for telegraph and telephone companies. The language was not exactly the same, but no substantial difference in purpose or effect existed. The original section 19, Article XI, provided in part as follows:

> "In any city where there are no public works owned and controlled by the municipality, for supplying the

same with water or artificial light, any individual or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations, as the municipality may prescribe for damages and indemnity for damages, *have the privilege of using the public streets* and thoroughfares thereof, and laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon condition that the municipal government shall have the right to regulate the charges thereof."

The language of the foregoing provision seems so clear as to require no construction and no search for implied or double meanings. But the provision is in direct conflict with those parts of Sections 22 and 31 of Article IV, on which plaintiff now relies, *if* Sections 22 and 31 of Article IV mean what plaintiff now claims they mean. If those sections are violated by Civil Code 536, they are violated at least in principle by Section 19, Article XI, of the Constitution itself. If sections 22 and 31 of Article IV mean what plaintiff now claims they mean, then the framers and adopters of the constitution did with the left hand what they wrote with the right hand might not be done. But such a situation may not be. While lawmakers and judges may be inconsistent and self-contradictory, the framers of a constitution may not be, for the constitution is the word of the ultimate and sovereign power.

Thus the court is compelled to question the soundness of plaintiff's present interpretation of Sections 22 and 31 of Article IV as applied to Civil Code 536. In the necessity of reconciling section 19 of Article XI with sections 22 and 31 of Article IV, we are confronted by three words demanding consideration. One is the word "gift;" one, the word "donation;" one the word "grant."

Section 31, Article IV, denies the legislature "power to make any gift or authorize the making of any gift of any public money or thing of value. . . ."

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Section 22, Article IV denies the *state* the power to make any "*grant or donation of property. . . .*"

It might be argued that there is no conflict in denying to the legislature a power like that exercised directly by the people through the Constitution, but that argument would not apply to Section 22 which denies authority to the state as such, not merely to the legislature. Furthermore, as counsel for plaintiff aptly has argued, section 31, Article IV, doubtless was written for the purpose of enunciating and writing into the basic charter a certain sound principle of government, and it is not likely that the framers of the constitution themselves would violate a principle of government that they desired to write into the foundational document for others to respect.

It is possible, as one of counsel suggested, when considering a problem such as the one now before us, to become overly concerned with definitions rather than with facts. Yet, because we are dealing with words which, theoretically at least, denote facts, we are compelled to deal with both meanings and facts. In both law and lay usage, a gift is something voluntarily bestowed without return or compensation, or, as we say in the law, without consideration. For our purposes it probably is better to think with the word "consideration," because by the legal meaning of that term, it may consist of either a benefit that moves to the promisor or a burden that is undertaken by the promisee. It seems too clear to require argument that Civil Code 536 does not give away something of value without exacting a return. Indeed the section operates strictly on a pay-as-you-enter basis. In this respect the language is not nearly so liberal as was that of the original section 19 of Article XI of the Constitution. That section made an outright investment of "the *privilege* of using the public streets" in individuals and companies that complied with a few requirements as to incorporation and purpose of business. Civil Code 536 merely says that certain companies "may erect poles, posts, piers," etc., the terminology setting nothing apart and reserving nothing, until the pole, the post, or the pier is constructed in place. Section 536 delivers nothing until the consideration is delivered to the community, and the privilege it conveys ceases to exist the minute the recipient ceases

to perform the public service, in return for which the privilege is created.

Although as previously indicated, it is not my intention to be concerned over purely academic niceties of definition, I am inclined to value a discriminating comment made in James C. Fernald's work on "English Synonyms, Antonyms and Prepositions." The work is rather old, but not nearly so old as the constitutional provisions with which we are dealing. Treating the word "gift" and its several synonyms, the famous lexicographer said: "A gift is in the popular, and also in the legal sense that which is voluntarily bestowed *without expectation* of return or compensation." This distinction penetrates to the core of the matter and causes us to realize that motive is an essential factor in the transaction. What may appear to be a gift on its face may in reality be payment intended for profit. What may in truth be a gift may, under the law of harvest, bring a return. It is evident that in enacting section 536 of the Civil Code, the legislature expected a return to the people of the state. It is equally evident that compensating good to the people of the state was the motive for the enactment. Here was no conveyance to any named corporation. Here was no preference to any named company. The invitation went forth to all comers, without any discrimination. The legislature said "we want our people to have the advantages of telegraph service;" and later, "we want our people to have the advantages of telephone service." This implied declaration was the basic premise of section 536. Continuing, the legislature said: "that we may have these modern conveniences, at the most economical rates, we make the use of our public streets and highways available to those who will provide the necessary private capital to supply the desired service."

The tendency to monopoly in this type of business is not the result of section 536, and is not promoted in the slightest degree by that section, but is inherent in the character of the business, a fact recognized and provided for by the state's regulation and by its control over rates.

Plaintiff's scholarly counsel has argued that the proposition as just stated by me is exactly the kind of propo-

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sition governing bodies had made to railroads and perhaps to other public utilities before the *Constitution of 1879* was adopted and that it is the kind of transaction the framers of the Constitution intended to abate. Counsel's statement of facts may be right, although there is a vast difference between the creation of a privilege generally for a class, making no discriminations, as is done by section 536, on the one hand, and the making of a specific conveyance or grant to a specific named person, corporate or natural, on the other hand. That difference ought to be borne in mind as one reads the cases. In any event, regardless of the precise accuracy or inaccuracy of the statement as an historical reference, it is an argument inappropriate to the point instantly under consideration.

In the simple statement of Section 31, Article IV, of the Constitution that the legislature shall not "have power to make any gift or authorize the making of any gift" of any "thing of value," we have a clear statement, expressing an idea as clearly as can be done by the language, entirely free of ambiguity, a statement that is reasonable, that means the same whether considered by itself or in its context, a statement that is consistent with the context and that, unless given an artificial or strained meaning, is not in conflict with other parts of the Constitution or with principles enunciated or approved by the Constitution. In these circumstances, there is no occasion to look to extraneous facts to learn the meaning of the words used, and under a familiar rule of construction we are not permitted to do so. If the framers of the Constitution intended to say one thing but in fact said another, doing so with perfect clarity and consistency of expression, it is not for the courts to redraft the law thus stated.

This brings me to another significant fact. Section 536 of the Civil Code was the law of the state before the Constitution of 1879 was adopted. It must be presumed that the designers of the Constitution were familiar with the section. It would have been a simple matter for the writers of the Constitution to say that no franchise to use the public streets or highways shall be granted to any telegraph company except upon payment of a substantial consideration

in money to the incorporated city or to the county wherein the use is to be made. Or it might have been said that no telegraph company shall use the public streets or highways for the placing of poles, posts, piers, etc., until it first shall have obtained from the incorporated city or from the county wherein the use is sought a franchise granting such use, for which franchise it shall pay a substantial consideration in money. The facts that a possible objective was so easy and clearly of attainment, that the subject matter was in the mind of the draftsmen, and that the clear and effective language required by the objective was not used, support a strong inference that the possible objective was not the intended one.

The second word for our consideration is the word "donation" as used in Section 22 of Article IV of the constitution. The skillful workman with words doubtless would discriminate between the word "gift" and the word "donation." The latter word often is used when the thing given is to be consumed through use within the near future. Also, more often than not, I think, the word is used in respect to a gift of money. There is another shade of meaning pointed out by Mr. Fernald in his work previously mentioned. He said: "A donation is something . . . given usually on some public ground, as to a cause or to a person representing a cause, but not necessarily of value beyond the immediate present."

As a donation is a gift and as any special shade of meaning the word "donation" may have lends nothing to plaintiff's cause, my discussion of the word "gift" and its use in the constitutional provision in question applies also to the word "donation."

I come now to the word "grant" as used in Section 22 of Article IV. A grant may or may not be a gift. One of its meanings is synonymous with the word gift. We have then at first appearance a question: Was the word "grant" intended to be synonymous with the word "gift", and was it used to supplement the word "donation" by indicating something of more permanent character than the word donation," or was the word "grant" used in its broad meaning to denote any transfer or conveyance of a thing of value, whether as a gift or for consideration?

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If it was used in that latter sense, the plaintiff has stated no cause of action except only for an outright injunction, because the complaint is founded on an alleged right claimed by plaintiff to grant to the defendant a franchise, or an easement, or a privilege by any other name, in the public streets and highways of the county, whereby the defendant might place and maintain poles, posts, piers, etc., in such streets and highways. If such a grant is forbidden by the Constitution, plaintiff is not exempt from that basic law and may not grant a franchise and may not collect any compensation for a franchise. In such a circumstance, it might be possible for plaintiff to have a cause of action for damages, but no such cause is pleaded.

As the able counsel for defendant has pointed out, if the word "grant" was used in the broad sense of denoting every transfer or conveyance of a thing of value, then neither the state nor any city or county thereof since the adoption of the Constitution of 1879 has had authority to grant any franchise. But the point may be carried to an even more absurd conclusion. If every kind of transfer and conveyance of property by the state was forbidden by the use of the word "grant" in Section 22 of Article IV, then every deed issued by the state conveying property purchased on sale for delinquent taxes is invalid as a transaction enjoined by the Constitution.

The foregoing considerations and also the context in which the word "grant" appears compel me to the conclusion that the word was used as a synonym of the word "gift," denoting the same kind of a transaction as the word "gift", and contrasting with, and supplementing, the word "donation" only in the sense that whereas the word "donation" was used in its ordinary sense of indicating something of temporary use, something to be consumed in the using, the word "grant" was used to denote things of lasting or permanent use and value.

Thus as to all three of the words in question, "gift," "donation," and "grant," we are dealing with the one idea denoted by the word "gift," which embraces the other two terms; and my discussion of the use of that word applies also to the use of the word "grant" as it is employed in the constitutional provision under consideration.

As there has been a good deal of comment on the "incalculable" value of the right created by section 536 of the Civil Code, on the millions of dollars that a company would have to pay for equivalent easements over private lands, it seems that although irrelevant to the question at hand, I should conclude with some discussion of the social and economic policy involved. Manifestly, in one form or another, the public must pay for its telephone service. This would be true if the business were owned by one giant capitalist, the state, rather than by many private citizens, all of whom are part of the public. If the telephone company were required to pay the "incalculable" sums for the privilege of placing its poles and wires in public streets or over private property, the sums so paid would have to be accounted for in the rates charged the public. Because of the peculiar nature of the telephone business, being a business wherein the unit costs, instead of being decreased by enlargement of the business, are increased, and because of the additional financing that the payment for franchise privileges would require, it is quite possible that the plan advocated by the plaintiff, resting on its contention that Section 536 of the Civil Code is unconstitutional, would cost the public more than the plan originated by the legislature and maintained by it for many decades.

When we undertake to appraise the value of using the public streets and highways, we ought not to overlook the value of such use to all persons, other than the telephone company. What is the value of that use, for instance, to a great furniture store, whose trucks must have such means for delivery of goods? What is the value of that use to a great oil company, which must deliver its products to the service station near your home and to the hundreds of other service stations near the homes of millions of other citizens? It is not necessary to go on indefinitely, giving illustrations, as one might.

Who, in the use of public streets, incommodes the public so little as does a telephone company by placing and maintaining its poles and wires? And what use of the public

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streets costs the public so little? Indeed, the question might fittingly be asked, does that use cost the public any substantial sum? True, telephone poles have been known to bring to an abrupt end the wild ride of a drunken driver. But no one not drunk would blame the telephone pole for that interference. And poles and wires may be unsightly, but so may be billboards and buildings, and so certainly are many trucks and trailers and the loads they carry. If one will drive from Bakersfield to Los Angeles at a late hour of the night, he will be impressed by the extent to which he can be incommoded, discommoded and placed in peril by the numerous trucks on the highway, and he will be inclined to a comparatively friendly feeling for telephone and telegraph poles.

The legislature has made many rules for the use of the highways, and subject to those rules, they are open to the public generally. The use made under section 536 of the Civil Code is different from that made under other acts only in the physical nature of the implementation, but so far as concerns the burden on the public, the difference definitely is in favor of the use made under section 536; and so far as concerns the principle involved, there is no difference. It is a grave mistake in thinking to set the stockholders of a telephone company apart and then to draw a line between them and the public. They are as much a part of the public as any of us. That they have been able to save some money and have invested it in an enterprise that performs a service indispensable to a modern community does not isolate them from the public nor place them in a position where their interests are adverse to those of the public. Nor do these facts mean that if such persons are able to make a fair profit on their investment they are enemies or oppressors of the public.

In establishing the legislative policy in question the foregoing considerations doubtless were in mind, and even if this court disagreed with such observations, the language used by the legislature in voicing its policy, and by the Constitution in the provisions in question, would not justify, in my opinion, voiding the act of the legislature. Hence it is my conclusion that section 536 of the Civil Code is a constitu-

tional enactment, entitled as such to the respect of, and to enforcement by, this court.

Dated May 2nd, 1944.

WILLIAM J. PALMER,
*Judge.*

(Endorsed:) No. 410067. Decision on Question Whether or Not C. C. 536 Is Constitutional. Filed May 2, 1944. J. F. Moroney, County Clerk, by W. L. Goff, Deputy.

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## APPENDIX "B"

No. 410067

(Title of Court and Cause)

NOTICE OF DECISION

In view of the extensive research and briefing done by counsel in this case, it would be an act of supererogation for this judge to attempt an additional assembly of precedents for their enlightenment. This notice is dictated for only one purpose, and that purpose is not to make a contribution to the body of the law, but rather only to inform counsel of the court's decision in this case, and, as briefly as possible, of the court's reasons for the decision.

In the final brief of counsel for plaintiff we have, I think, a correct statement of the nature and basis of plaintiff's alleged cause of action, a much clearer statement than can be gathered from the complaint itself. The cause of action, if it be such, stated as simply as possible, is this: The defendant is a trespasser upon the public highways of the county and it is such because section 536 of the Civil Code, under which defendant claims, is unconstitutional. Plaintiff concedes again that defendant maintains no nuisance except only as the bare fact of being a trespasser constitutes a nuisance. Hence, we need not discuss the subject of nuisances.

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Plaintiff seeks two remedies. It asks for two per cent of defendant's gross profits from a time two years next immediately preceding the commencement of the action, and for what plaintiff's counsel now terms a conditional injunction. The former of the two prayers suggests a novel remedy. I know of no law, theory or principle of law that would justify it and counsel has cited none. It is plain that the pleader had in mind the "Broughton Act", Act 2720, Deering's General Laws, titled the "Franchise Sales Law." But that act does not even purport to change the law governing damages for trespass, section 3333 of the Civil Code. Plaintiff has alleged no damage and has proved none. Indeed plaintiff concedes a benefit to the county, calling it an "indirect" benefit, and the evidence amply supports that concession, whether the benefit be called direct or indirect.

At an early stage of the proceedings, I informed counsel of my opinion that if Civil Code section 536 is constitutional, the complaint states no cause of action. I would reassert that opinion in the light of plaintiff's latest definition of the nature of its action.

The "conditional injunction" proposal sifts down to this: Having taken jurisdiction of the cause, a court of equity ought to make complete disposition of it, whether the appropriate relief appears to be the remedy prayed for or some other type of relief. To grant an injunction or a "conditional injunction" which might become an injunction, the effect of which would be to stop telephone service in Los Angeles County, is, of course, incomprehensible. The city police departments, fire departments, and the sheriff's office, to say nothing of all the other agencies of government or of the needs of the sick or of private citizens generally, would lose much of their effectiveness in the effort to protect the county against crime; and from the military authorities of the United States probably would come a declaration of martial law made necessary by the need for keeping the telephone service alive. If plaintiff is entitled to any relief, the remedy would be an order of this court directing the defendant to purchase a franchise from the County of Los Angeles and providing for the appointment of a commissioner or other agent of the court to execute

such a contract in behalf of the defendant in the event it should refuse to do so. An action for the franchise payments would follow if they were not paid.

In an opinion delivered at plaintiff's request in the course of the trial, I held that section 536 is a constitutional, valid enactment. To repeat the statements then made is not necessary, although I might suggest a thoughtful reading of the informal memorandum, not that counsel would gain enlightenment from it, but only that it might be fairly understood and represented. Counsel for plaintiff have been given a genuine opportunity to prove the fallacy of that opinion, and I am sure that as they see the matter, they have succeeded. I do not, however, seem to place the same value as they do on their arguments, and some brief comment on them might not be out of place.

Counsel disagree with me as to the significance of section 19, Article XI of the Constitution, whereby private water companies were given the privilege of using the public streets. They argue that this is a point in their favor, showing that the framers of the Constitution intended that the people, through the Constitution, and not the legislature, be the only power from whom such a dedication might come. But the people are the state, and counsel overlook the fact that part of section 22, Article IV, on which they rely, does not refer to the legislature but denies to the *state* the very power which, if counsel's arguments are sound, was exercised by the state in section 19, Article XI. The conclusion necessarily follows that the writers of the Constitution, in using the word "grant" in section 22, Article IV, could not have intended the establishment of a right like that announced in section 19, Article XI, which is exactly the same kind of a right in the public streets as that decreed by the legislature in section 536, Civil Code. Except only for the incidental differences in the two kinds of uses, the rights are identical in their nature.

Counsel have argued at considerable length to restrict the effect of the cases cited by themselves on page three of their trial memorandum, and to which reference was made by the court . To discuss those cases in detail would be of no importance when the one outstanding fact to which this court attached importance is not only conceded by plaintiff's

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counsel but has been emphasized with much force and underscoring. That fact is that the Supreme Court of California, consistently whenever opportunity has presented itself, has dealt with section 536 of the Civil Code as a valid, constitutional enactment.

Plaintiff's counsel have argued correctly that questions of social and economic policy are not before this court and are not in any degree determinative of the legal question submitted. This court stated the same thing in its opinion during trial and made quite clear the fact that the court commented on such points only because counsel for plaintiff previously had given them a good deal of attention.

We have further insistence that section 536, Civil Code, makes a gift of public property to telephone companies. This insistence proceeds from the contention that the right which goes to telephone companies from the state under the section is totally bare of consideration. At this point I feel that I fail in some way to comprehend counsel's reasoning, for they admit that the state has received and continues to receive a benefit from the installations and service of the defendant and its predecessors, flowing from their investment and efforts in reliance on section 536 and their adaptation to public use of the rights created by the section. Perhaps counsel attach importance not readily apparent to the designation of this benefit as an "indirect" benefit. I am not certain of understanding counsel's meaning in their use of the term "indirect" in this connection, but I see no need to discuss the question whether the admitted and significant benefit should be regarded as direct or indirect, because the law of consideration does not require that the benefit conferred be a direct as distinguished from an indirect one. Indeed, no benefit need be conferred on one party if the other assumes a burden in return for what he receives.

Evidently counsel find significance in the fact stressed by them that the defendant yet owns every telephone pole, every foot of wire, every installation made by it in the public highways; but what does that fact have to do with the question of consideration? The passing of title is not a requisite of consideration; the value of property is dependent on its use and its adaptability for use; and one may

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enjoy that value and be benefitted by such use although not the owner of title. We are reminded also that every telephone user pays for the service he receives; but this does not change the fact that the private capital of other persons was invested and risked to buy the equipment and to employ the technical knowledge, the efficiency, and judgment, required to provide the service at the rates established.

I am tempted to remind counsel of a story. The newlyweds, who had used a very long list for their wedding invitations, with a resulting stock of silverware, china, glassware, linens, et cetera, and the usual duplications, were putting their home in order when a letter came, written on quality stationery and in a good hand. The letter went like this:

> "Dear Friends: After strenuous days establishing a home and attending to the many little duties involved in placing one's house in order, I know that you will enjoy an evening at the theater. Enclosed are two tickets to the Biltmore for Friday evening of this week. I'll let you guess who is sending them.!!!!"

An appropriate and timely gift, the newlyweds thought, and they commenced guessing. Returning from the theater they were still guessing until, arriving home, they discovered the effects of a perfect burglary, with much of the silverware missing. On the dining table was a brief note saying, "Now you know who."

Yes, the theater tickets were a "gift" but I am sure that the California legislature did not intend that kind of a "gift", when they enacted section 536 of the Civil Code. Would it not prove to be a similar sort of gift if now, after the invitation of section 536 has been accepted and acted upon, after the people have received the consideration, after the telephone and telegraph systems have been established by private capital, and not by taxpayers' money or government bonds, after the people (the state) have accepted all the intended benefits, the state were to say: "Sorry, but permitting you to use the public streets was a gift, totally devoid of consideration and hence invalid,

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so move along to private property or commence paying for the gift."†

The plain fact is that when the legislature enacted section 536 it did so for only one purpose and that purpose was to encourage the use of private capital, private business judgment, and technical skill, and to invite the use of the public highways, in the establishment of a system of modern and needed communication for the benefit of the people of the state. That purpose does not comport with the conception denoted by the word "gift".

Counsel have induced me to purchase "Webster's Dictionary of Synonyms", published in 1942 to find out what the framers of the Constitution meant in 1879 when they used the word "grant" in Section 22, Article IV, whereby they denied to the state the authority to make any grant of property. This excellent work points out (p.66) that the word "grant" has general uses which are to be distinguished from the special use sometimes designated by the term "grant-in-aid". It defines this special term as quoted by plaintiff's counsel in their opening brief (pp. 14, 15), and illustrates the use of the term, as not quoted, in the following language:

> "thus grants of land (land grants) from the federal government were made to various railroads building new lines and to various colleges and universities providing agricultural and industrial courses in the mid-nineteenth century; the Rockefeller Foundation makes grants chiefly to institutions engaged in health and medical research."

Counsel for plaintiff seem to contend that the framers of our Constitution, when using the word "grant" in restricting the power of the state, used it in that special sense sometimes denoted by the term "grant-in-aid", as that term is defined and its use illustrated in Webster's Dictionary of Synonyms. This definition and these illustrations may, indeed, be helpful. One of the essentials appears to be a specific, named grantee. We can eliminate certain possibilities. For reasons pointed out in my opinion delivered in course of trial, we must conclude that the Consti-

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tution does not forbid grants for compensation, although the language specifies no such exception. For reasons also pointed out in that opinion, the reasonable deduction is that the makers of the Constitution did not intend to forbid designations of use of public highways in the installation and maintenance of certain necessary public utilities for the public benefit, as was done by the Constitution itself in respect to private water companies. It seems quite probable, therefore, that what the framers of the Constitution intended to forbid was the giving away of public lands and moneys to specific, named private corporations, associations and other institutions, in the manner illustrated in the cited work on synonyms.

If we shall be realistic, we shall note a decided and important distinction between the outright grant of a tract of land or the donation of a sum of money or the grant of a monopolistic franchise to a specific, named private corporation or association, for its exclusive use, on the one hand, and, on the other hand, the provisions of section 536, Civil Code, whereby it is directed that among the many uses to which public highways may be put shall be the use by telephone and telegraph companies, not any one such company, but all such companies then in existence or thereafter to be formed, so long as other users of the highways are not incommoded.

The use of the word "exclusive" in connection with the right conferred by section 536 has been greatly over-emphasized. Such "exclusive" right as this section confers comes only from the law of physics, that two bodies may not occupy the same space at the same time, and not from any other necessary implication in the code section. In providing that the telegraph and telephone installations must not incommode the public use of the highway, the law places the telegraph and telephone companies, as to such installations, at the bottom of the list among highway users, and that position is a far cry from exclusiveness. No company is given an exclusive right over any other company in this restricted use of the highways. All must be accommodated, and the road commissioner or other authority in charge may order a pole moved whenever in his discretion

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such moving is required by the public convenience. Because of the law of physics the parked automobile has the same "exclusive" use of a bit of the highway, while it is parked, as the telephone company has of a tinier bit of ground, off the traveled portion of the highway, while the pole remains in place. Indeed the "exclusive" privilege of the parked car, except in a restricted parking area, rests on a more secure basis than does that of the telephone pole, although in most instances the function of the parked car is purely private and often to serve a pleasure-bent owner.

The guarded and restricted privilege of the telephone company is such a different status from the ownership of fee title to a section of land and from the ownership of a monopolistic franchise and from the ownership of a sum of money that one must totally ignore facts to insist that because all are property rights no distinction may be made between them.

The familiar principle, often announced, and stated again recently in Hill v. Fowble, 65 A.C.A. 45 (3), is that the practical construction given a contract by the parties in their conduct and actions while executing the agreement is strong evidence of what was intended. This principle applies with extraordinary force and appropriateness to section 536, Civil Code, in respect to which, since the adoption of the Constitution, and until the preliminaries of filing of the instant suit, the practical construction adopted by the state in all departments called upon to construe the section and its relationship to the Constitution has been uniform, and consistent with the validity of the section.

This observation brings me to the question of estoppel. Counsel for plaintiff have foreclosed the defense of estoppel with such absoluteness and finality, shutting their case off from it with such iron-clad, water-proof, fire-proof, and bullet-proof encasement as to invite some suspicion of the merit of the argument, because we like to think of the doctrine of equitable estoppel as a principle having a degree of flexibility, capable of being molded into the factual form of a given case when justice cannot be done without it, and hence a principle, the application of which



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nearly always is debatable, and which presents some appeal to the conscience and discretion of the chancellor.

California no doubt would recognize the principle of equitable estoppel if there were no statutes on the subject. However, we do have legislative enactments to which we may look to learn the nature and scope of the principle. They are section 1962, par. 3, Code of Civil Procedure, and sections 3512, 3515, 3516, 3517, 3519, 3521 and 3528 of the Civil Code.

The method of counsel for plaintiff in disposing of the defense of estoppel in this case is as simple as it is precise and efficient. The steps are as follows: (1) Section 536 is unconstitutional. (2) Hence, every act by an official of the state which has rested upon, assumed or recognized the act as a valid enactment, has been ultra vires. (3) The state may not be bound by the ultra vires acts of its official agents. (4) Therefore, no estoppel can rise against the state from those acts.

In support of step (2) counsel cite a number of cases on page 36 of their opening brief. These cases announce the familiar rule that acts of public officials "in excess" of the power conferred upon them are ultra vires and not binding on the state, county or city involved.

There appears to be a weakness in the argument that comes from ignoring the fact that all the official conduct upon which defendant relies in the defense of estoppel was conduct within the scope of the authority vested in the respective officials, and the further fact that defendant relies not only on acts but on omissions to act. The legislature has authority to legislate and to be the first to determine the constitutionality of a proposed enactment. It has power to err in deciding that question, but there is a rebuttable presumption that its decision is correct and that the statutes it creates are constitutional. Executive and administrative officers of the state have the right, if not a duty, to rely on that presumption until it is overcome. The Supreme Court has authority to question the validity of a statute, to decide whether or not it is constitutional, to announce its decision, and to err in its judgment. The county assessor and the county tax collector have full

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authority to do everything they did which is included in the recitation of facts upon which defendant relies. They, too, have authority to err in the judgment they are required by law to exercise. The same rule applies to the road commissioner and to the board of supervisors and to the district attorney and to the county counsel. A significant feature of the defense of estoppel in this case is that no act or proceeding included in the long series of official conduct upon which defendant has relied was an act or proceeding done or conducted in excess of the authority vested in the respective officials.

Counsel for plaintiff cite the four requisites of estoppel, as summed up and stated on page 627 of 10 California Jurisprudence. As stated in that work, the four listed conditions generally are required, but the pages that follow to page 645 must be read, if one does not read all the cases cited to learn that those four requisites are not nearly so rigid as they appear in the summary and that in practical application the doctrine is as flexible as I suggested at the outset of this discussion.

Much importance appears to be attached to the fact that defendant and its predecessors, having able counsel to advise them, always have been in equal position with the plaintiff to know the law. We may conclude, of course, as counsel for plaintiff urge, that defendant and its predecessors have relied on the advice of their own counsel. But these facts and deductions do not seem to me to be a complete answer. As former Chief Justice Hughes once wrote, the law is what the Supreme Court says it is, and if a lawyer may not rely on what the Supreme Court of his state has done, and if he may not rely on what the legislature has done, with the later sanction of the Supreme Court, and if he may not rely on what many other capable officials of the state have done, they in turn relying on the legislature and the Supreme Court, then it may not be said that he has had a fair opportunity to know the truth and a fair basis upon which to advise his client. If all the officials of the state with whose conduct he must be concerned combine to deceive him, certainly the fact that he is a lawyer, with his own right to have thoughts as to

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what the law is or should be, does not deprive him of the right or rid him of the necessity of advising his client in accord with the practical interpretation placed on the law by the officials of the state.

If counsel for plaintiff now are right, then every tax that has been collected from the defendant and its predecessors levied against the "franchise" held under section 536, has been wrongfully collected because if defendant has been only a trespasser, it has had no franchise to be assessed or taxed, and this is the kind of irreconcilable reversal of position, I think, with which the law is concerned in connection with the doctrine of estoppel. The county, through the many years, has assessed and collected taxes from the defendant and its predecessors claiming that they have held a valid, valuable and taxable property right under section 536. The county has used that money and makes no offer to restore; indeed, does not even come before the court and admit having collected the money wrongfully or even offer to credit the wrongfully collected sums against the franchise payments it seeks. Yet by this action it would make a complete reversal of its position and would declare the defendant to be only a trespasser. This, I think, is rather typical of the kind of situation for which the doctrine of estoppel was conceived to implement the purpose of the court to do justice and to prevent injustice.

It is the decision of the court that the plaintiff is not entitled to take anything by this action. Counsel for defendant will prepare findings, conclusions and judgment.

This case is now on the court's calendar for Monday, August 21, 1944, having been placed there pending the filing of briefs and the consideration thereof and decision by the courts. As there is no occasion for its being on the calendar in the light of this decision, it is ordered off calendar.

Dated: August 18, 1944.

WILLIAM J. PALMER,
*Judge of the Superior Court.*

(Endorsed): No. 410067. Notice of Decision, Filed Aug. 18, 1944. J. F. Moroney, County Clerk, by W. L. Goff, Deputy.

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## APPENDIX "C"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 410067

COUNTY OF LOS ANGELES, Plaintiff,

v.

SOUTHERN CALIFORNIA TELEPHONE COMPANY, a corporation, Defendant.

### Findings of Fact and Conclusions of Law

This cause came on regularly for trial on the 26th day of April, 1944, before the court sitting without a jury in Department 12 thereof, the plaintiff being represented by J. H. O'Connor, Esq., County Counsel of the County of Los Angeles, by S. V. O. Prichard, Esq., Assistant County Counsel, and Gerald G. Kelly, Esq., and A. Curtis Smith, Esq., Deputies County Counsel, and the defendant being represented by Messrs. Pillsbury, Madison & Sutro and Messrs. Lawler, Felix & Hall, by Oscar Lawler, Esq., John W. Holmes, Esq., and Thomas H. Hearn, Esq., its attorneys, and oral testimony and documentary evidence having been offered by the parties respectively and received by the court, and the parties, through their respective counsel, having made and entered into certain stipulations and admissions, both oral and in writing, and counsel for the respective parties having submitted oral arguments and written briefs, and the court, having heard and considered all of the testimony and evidence so offered and received, and having heard, read and considered all of the said stipulations and admissions of counsel and having considered said arguments and briefs and being fully advised in the premises, now makes its findings of fact and conclusions of law herein as follows:

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## Findings of Fact

### I

Plaintiff is now and during all the times herein stated has been a body politic and corporate, a county of the State of California.

### II

Ever since the 19th day of April, 1916, defendant has been and is now a corporation, organized and existing under the laws of the State of California for the purpose, among other purposes, of engaging in the telephone and telegraph business. Ever since its incorporation defendant has been and is now a wholly owned subsidiary of the Pacific Telephone and Telegraph Company, which now owns and at all times since the incorporation of defendant has owned all issued and outstanding capital stock of defendant.

### III

At all times between and including the 27th day of April, 1889, and the 30th day of April, 1937, Sunset Telephone and Telegraph Company (hereinafter called "Sunset") was a corporation organized and existing under the laws of the State of California for the purpose, among other purposes, of engaging in the telephone and telegraph business, and at all times during the period commencing on or about the 27th day of April, 1889, and until on or about the 2nd day of January, 1907, said Sunset engaged in and carried on, in the State of California and in other states of the United States, an exchange and interexchange, intrastate and interstate telephone, and an intrastate and interstate telegraph business, and for such business maintained and operated, in the State of California and in said other states of the United States, an exchange and interexchange, intrastate and interstate telephone and intrastate and interstate telegraph system. At all times during said period, Sunset, for the purposes and as a part of its said business and system, constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines and lines of telegraph along and upon the public

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roads and highways and along and across the lands and waters of the State of California and of the incorporated and unincorporated areas of the plaintiff County, and constructed, erected, maintained and operated along and upon said roads and highways and along and across said lands and waters, poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any such road or highway or to interfere with the navigation of any such waters, and by means thereof rendered telephone and telegraph service to the public.

IV

At all times since the 31st day of December, 1906, said The Pacific Telephone and Telegraph Company (hereinafter called "Pacific") has been and now is a corporation organized and existing under the laws of the State of California for the purpose, among other purposes, of engaging in and carrying on, and it has engaged in and carried on and is now engaging in and carrying on in the State of Califoria and in other states of the United States, an exchange and interexchange, intrastate ad interstate telephone and intrastate and interstate telegraph business, and for such business manitained and operated, in the State of California and in said other states of the United States, an exchange and interexchange, intrastate and interstate telephone and intrastate and interstate telegraph system. At all times since the 2nd day of January, 1907, said Pacific, for the purposes of its said business, and as a part of said system, has constructed, maintained and operated, and has held itself out to the public as constructing, maintaining and operating, telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters of the State of California, and has constructed, erected, maintained and operated along and upon said roads and highways and along and across said lands and waters, poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any of said roads or

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highways or to interfere with the navigation of said waters and by means thereof rendered telephone and telegraph service to the public. Continuously during the period from on or about the 2nd day of January, 1907, to the 31st day of May, 1930, said Pacific, as a part of its said system and business, constructed, erected, maintained and operated its said lines and its said poles, posts, piers and abutments for supporting said lines along and upon the public roads and highways and along and across the lands and waters in and throughout the incorporated and unincorporated areas of the plaintiff county, and by means thereof rendered and continued to render telephone and telegraph service to the public.

V

1. On the 2nd day of January, 1907, and the 17th day of October, 1907, said Sunset leased to said Pacific for a period of thirty (30) years all of said Sunset's said system and all property, real and personal, owned and used by it in and in connection with its said telephone and telegraph system in the States of California, Washington and Oregon, including all of said Sunset's rights, privileges, franchises and property, except its corporate franchise, in and throughout the said states. Said leasing was accomplished by two indentures in writing, copy of each of which has been received in evidence herein, marked respectively "Defendant's Exhibit 19" and "Defendant's Exhibit 20."

2. Continuously from and after January 2, 1907, said Pacific maintained, operated, carried on and added to and extended the said telephone and telegraph business, system and property so leased to it by said Sunset, and by means thereof rendered telephone and telegraph service to the public.

3. On the 8th day of January, 1917, pursuant to and upon the authority of orders and decisions Nos. 3845 and 3959 of the Railroad Commission of the State of California, duly given and made respectively on November 4, 1916 (reported in Vol. 11 CRC at page 806), and December 29, 1916 (reported in Vol. 12 CRC at page 115), said Sunset sold, granted, conveyed, assigned and transferred to said

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Pacific all of said Sunset's property of every kind and nature whatsoever and wheresoever situated, including franchises, but excluding its corporate franchise, and including in particular said Sunset's said telephone and telegraph property and system. A copy of said conveyance has been received in evidence herein, marked "Defendant's Exhibit 22".

4. Except as hereinafter set forth, said Pacific, ever since the 8th day of January, 1917, has continued to and now does own the telephone and telegraph property, rights and franchises so acquired by it from said Sunset, and continues to and does now operate, maintain and extend the same.

VI

1. On the 30th day of April, 1917, pursuant to said order and decision No. 3845 of the Railroad Commission of the State of California (11 CRC 806), said Pacific sold, granted, assigned, transferred and conveyed to the defendant the Los Angeles and Eagle Rock Telephone exchanges of said Pacific, including all properties, both real and personal, and all rights and franchises, owned by said Pacific in the cities of Los Angeles, Watts, Vernon, Eagle Rock and Huntington Park in the County of Los Angeles, and in portions of the unincorporated areas of said county, within said exchanges, contiguous and adjacent to said cities, but excluding said Pacific's toll lines and the rights and franchises therefor in said exchanges. The boundaries of said Los Angeles and Eagle Rock telephone exchanges were, prior to and on said 30th day of April, 1917, established by the said Railroad Commission and are shown by red lines on a map received in evidence herein and marked "Defendant's Exhibit 27". A copy of said conveyance has been received in evidence herein marked "Defendant's Exhibit 24."

2. Continuously since the 30th day of April, 1917, the defendant has continued to, and still and now does, own, maintain, operate and extend the telephone and telegraph properties and system so acquired by defendant from said Pacific, in conjunction with and as a part of the general

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exchange and interexchange, intrastate and interstate telephone and intrastate and interstate telegraph system owned and operated by defendant.

## VII

1. At all times between the 22nd day of September, 1902, and the 30th day of April, 1917, Home Telephone and Telegraph Company (hereinafter called "Home of Los Angeles") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph businesses, and for the purposes of said business constructed, operated and maintained a telephone system, and as a part of said system constructed, maintained and operated and held itself out to the public as constructing, maintaining and operating telephone lines along and upon the public roads and highways, and along and across the lands and waters in the plaintiff county, and erected poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points in the said public roads, highways, lands and waters as not to incommode the public use of any of said roads or highways or to interfere with the navigation of any of said waters and by means of said system rendered telephone service to the public. Said telephone system of said Home of Los Angeles was maintained and operated in competition with said telephone and telegraph system owned, maintained and operated successively by said Sunset and said Pacific, in the area fixed, established and designated by the Railroad Commission of the State of California, as the Los Angeles Exchange of said Home of Los Angeles, and shown by yellow lines on the map received in evidence and marked "Defendant's Exhibit 27" herein.

2. Pursuant to said order and decision No. 3845 of the Railroad Commission of the State of California (11 CRC 806) and on the 30th day of April, 1917, said Home of Los Angeles sold, granted, assigned, transferred and conveyed to the defendant all of the real and personal property, including franchises, of Home of Los Angeles (except the corporate franchise, corporate records, cash, bills receiv-

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able and securities on hand), and particularly including the said telephone and telegraph properties and system then and theretofore owned, maintained and operated by said Home of Los Angeles. A copy of said conveyance has been received in evidence in this cause, marked "Defendant's Exhibit 23."

3. The aforesaid telephone and telegraph properties of said Pacific and of said Home of Los Angeles so conveyed to defendant as hereinbefore set forth were consolidated into and maintained and operated as a single unified telephone and telegraph system, and by means thereof defendant rendered and continues to render telephone and telegraph service to the public.

VIII

1. At all times between and including the 2nd day of June, 1904, and the 1st day of October, 1918, San Fernando Valley Home Telephone Company (hereinafter called "San Fernando Home") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business, and for the purposes of said business owned, operated and maintained a telephone system in competition with the business and system of said Pacific in portions of the incorporated and unincorporated areas within the plaintiff county, particularly in the cities of Glendale and Burbank and unincorporated areas contiguous and adjacent to said cities, and for the purposes of its said business and as a part of said system constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines along and upon the public roads and highways within said county, and poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in said roads and highways in such manner and at such points as not to incommode the public use of any of said roads or highways, and by means thereof rendered telephone service to the public.

2. On or about the 1st day of October, 1918, pursuant to and upon the authority of decision No. 5316 of the Rail-

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road Commission of the State of California, made April 16, 1918 (reported in Vol. 15 CRC, at page 572), said San Fernando Home sold, granted, conveyed, assigned and transferred to said Pacific all of the telephone plant and system of said San Fernando Home and all properties owned by it and used in connection therewith, including franchises, except its corporate franchise.

3. Pacific incorporated the telephone property, rights and franchises so acquired by it from said San Fernando Home into and consolidated the same with the telephone and telegraph system and property of said Pacific, and continued by means thereof to render telephone and telegraph service to the public.

## IX

1. At all times between and including the 29th day of April, 1903, and the 18th day of October, 1907, Compton Home Telephone and Telegraph Company (hereinafter called "Compton Home") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business, and for the purposes of said business owned, operated and maintained a telephone system in competition with the said telephone and telegraph business and system successively operated, as hereinbefore mentioned, by said Sunset and said Pacific in the incorporated and unincorporated areas within the plaintiff county, particularly in the city of Compton and in the unincorporated areas contiguous and adjacent to said city, and for the purposes of its said business and as a part of its said system, constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating telephone lines along and upon the public roads and highways within said county, and constructed, erected, maintained and operated along and upon said roads and highways poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any of such roads or highways, and by means thereof rendered and continued to render telephone service to the public.

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2. On or about the 18th day of October, 1907, said Compton Home, for a valuable consideration, transferred and conveyed to Consolidated Utilities Company all of its assets and property of every kind and nature, including its said telephone system.

3. At all times between on or about the 6th day of October, 1907, and on or about the 31st day of May, 1930, said Consolidated Utilities Company (hereinafter called "Consolidated") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business.

4. Continuously from the 18th day of October, 1907, until the 31st day of May, 1930, said Consolidated continued to own, maintain, operate and extend the telephone system and properties so acquired by it from said Compton Home, and by means thereof to render telephone service to the public.

X

At all times during the period commencing on or about the 28th day of June, 1903, and ending on or about the 31st day of May, 1930, Home Telephone & Telegraph Company of Pasadena (hereinafter called "Pasadena Home") was a corporation organized and existing under the laws of the State of California for the purpose of engaging in the telephone and telegraph business, and for the purposes of said business owned, operated and maintained a telephone system in the City of Pasadena and in unincorporated areas contiguous thereto, and for the purposes of its said business and as a part of its said system constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines along and upon the public roads and highways of the incorporated and unincorporated areas of said county, and erected, maintained and operated along and upon said roads and highways poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the public use of any of such roads or highways, and by means thereof rendered and continued to render telephone service to the public.

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XI

Continuously between on or about the 3rd day of September, 1902, and on or about the 31st day of May, 1930, United States Long Distance Telephone & Telegraph Company (hereinafter called "USLD") was a telephone and telegraph corporation organized and existing under the laws of the State of California, engaged in and carrying on, in competition with the business and system of said Pacific in the counties of Los Angeles, Orange, Riverside, San Diego, San Bernardino, Santa Barbara and Ventura, an interexchange intrastate and interstate toll and long distance telephone business and for such business maintained and operated, in and throughout said counties, an interexchange intrastate and interstate toll and long distance telephone system. At all times during said period USLD, for the purposes of its said business and as a part of its said system, constructed, maintained and operated, and held itself out to the public as constructing, maintaining and operating, telephone lines along and upon the public roads and highways and along and across the lands and waters of the State of California and of the incorporated and unincorporated areas of the plaintiff county, and constructed, erected, maintained and operated, along and upon said roads and highways and along and across said lands and waters, poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of any of said roads or highways or to interfere with the navigation of any such waters, and by means thereof rendered and continued to render telephone service to the public.

XII

1. On the 31st day of May, 1930, under and pursuant to the authority of decision No. 22333 of the Railroad Commission of the State of California, made April 14, 1930 (reported in Vol. 34 CRC at page 584), said Pacific sold, granted, conveyed, assigned and transferred to the defendant all of the telephone and telegraph property, assets and business of said Pacific in the counties of Santa Barbara,

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Ventura, San Bernardino, Los Angeles, Orange, Riverside, San Diego and Imperial, including real and personal property of all kinds and including all franchises (except its corporate franchise) owned by said Pacific in said counties. A copy of said conveyance has been received in evidence herein, marked "Plaintiff's Exhibit I."

2. Under and pursuant to the authority of said decision No. 22333 of the Railroad Commission of the State of California (34 CRC 584), said Pasadena Home, on the 31st day of May, 1930, sold, granted, conveyed, assigned and transferred to the defendant all of the property, assets and business of said Pasadena Home, including all of its real and personal property of every kind and including all its franchises (except its corporate franchise). A copy of said conveyance has been received in evidence in this cause, marked "Defendant's Exhibit 16." Upon making said conveyance and continuously thereafter said Pasadena Home retired from the telephone business.

3. Under and pursuant to the authority of said decision No. 22333 of the Railroad Commission of the State of California (34 CRC 584) said Consolidated, on the 31st day of May, 1930, sold, granted, conveyed, assigned and transferred to the defendant all of the property, assets and business of Consolidated, including all of its real and personal property of every kind and including all its franchises (except its corporate franchise). A copy of said conveyance has been received in evidence in this cause, marked "Defendant's Exhibit 17." Upon making said conveyance and continuously thereafter said Consolidated retired from the telephone business.

4. Under and pursuant to the authority of said decision No. 22333 of the Railroad Commission of the State of California (34 CRC 584), said USLD on the 31st day of May, 1930, sold, granted, conveyed, assigned and transferred to defendant all of the property, assets and business of said USLD, including all of its real and personal property of every kind and including all of its franchises (except its corporate franchise). A copy of said conveyance has been received in evidence in this cause, marked "Defend-

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ant's Exhibit 28." Upon making said conveyance and continuously thereafter said USLD retired from the telephone business.

5. Said Sunset, Pacific, Home of Los Angeles, Pasadena Home, Compton Home, Consolidated, San Fernando Home and USLD are hereinafter sometimes referred to collectively as the defendant's corporate predecessors in interest.

XIII

Defendant consolidated said properties so conveyed to it by said Pacific, Pasadena Home, Consolidated and USLD with the said telephone and telegraph system then and theretofore owned, maintained and operated by defendant, as hereinbefore found, and continued to maintain and operate the same in conjunction with and as a part of defendant's said telephone and telegraph system and by means thereof has rendered and still continues to render telephone and telegraph service to the public.

XIV

1. The telephone and telegraph system so owned, maintained and operated by defendant as aforesaid has at all times been and now is a single and unified system, and has been and still is constructed, maintained and operated by the defendant as such. Said system has been throughout said time and is now being added to and extended by the defendant to meet the needs and demands of public telephone and telegraph service. By means of said system the defendant now engages in and carries on, and throughout all of said time has engaged in and carried on, a public exchange and interexchange intrastate and interstate telephone and intrastate and interstate telegraph system and business. Said system extends, and throughout all of said time has extended, throughout portions of the incorporated and unincorporated areas of this state and of the plaintiff county and, ever since the 31st day of May, 1930, has extended and now extends throughout the incorporated and unincorporated areas of the counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, San Diego and Imperial.

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2. In connection with and as a part of said system, the defendant has throughout all of said time owned, constructed, maintained and operated, and held itself out to the public as owning, constructing, maintaining and operating, and now owns, maintains and operates, lines of telegraph and telephone lines consisting of conduits with wires therein and poles and wires attached thereto, and of posts, piers, abutments and other necessary fixtures and appurtenances of said lines in, over and along substantially all of the streets, alleys and public highways and along and across the waters and lands throughout the incorporated and unincorporated areas of the County of Los Angeles and, ever since the 31st day of May, 1930, also along and upon substantially all of the streets, alleys and public highways and along and across the waters and lands throughout the incorporated and unincorporated areas of the counties of Santa Barbara, Ventura, Orange, Riverside, San Bernardino, San Diego and Imperial. Through the instrumentality of said exchange and interexchange and intrastate and interstate telephone and intrastate and interstate telegraph system and said conduits, poles, wires and other fixtures and appurtenances employed in conjunction therewith, defendant has been throughout all of said time, and now is, rendering throughout the incorporated and unincorporated areas aforesaid, to the public, exchange and interexchange, intrastate and interstate telephone, and intrastate and interstate telegraph services.

3. At all of said times said system, so owned, maintained and operated by the defendant, has included numerous telephone and telegraph instruments and stations; said system, at the time of the commencement of this action, and now, includes more than nine hundred thousand telephone stations, each of which has been and is an integral part of said system, and is and has been used and in use for public telephone and telegraph communication and service by connection with many hundreds of thousands of telephone stations in the states of California, Oregon, Washington, Idaho and Nevada, and with many millions of telephone stations throughout the United States and in foreign countries.

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4. The defendant's said system is, and at all of said times has been, so operated and maintained that, as a part of defendant's public telephone service, each such telephone station therein could be and can be connected and conversation had by means thereof, and of said telephone and telegraph lines, with each and every other of said telephone stations in said states of California, Oregon, Washington, Idaho and Nevada, and with each of said many millions of telephone stations throughout the United States and in foreign countries.

5. During all of said times all of the defendant's said telephone lines and lines of telegraph, and its said conduits, poles, wires, posts, piers, abutments, fixtures and appurtenances, which have been or now are in, along or upon the public roads, highways, streets, alleys, lands and waters in this state, have been and now are constructed, erected and maintained in such manner and at such points as not to incommode the public use of any of such roads, highways, streets or alleys or to interrupt the navigation of any of such waters.

## XV

1. On or about the 3rd day of February, 1903, the Board of Supervisors of plaintiff county adopted an ordinance designated as Ordinance No. 67 (N. S.) of said county, granting to one Arthur Wright and his assigns the right and privilege for the period of forty (40) years from and after the 2nd day of March, 1903, to construct, erect, maintain and operate telephone lines and lines of telegraph under, upon, over and along the streets, alleys and public highways of the plaintiff county, then or thereafter established. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit J."

2. Thereafter, and on or about the 3rd day of February, 1903, said Arthur Wright assigned, transferred and conveyed all of his rights under said Ordinance No. 67 (N. S.) to one F. F. Graves.

3. On or about April 18, 1904, said F. F. Graves assigned, transferred and conveyed all of his rights under said Ordinance No. 67 (N. S.) to said USLD.

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XVI

1. On or about the 7th day of April, 1903, the Board of Supervisors of plaintiff county adopted an ordinance, designated as Ordinance No. 70 (N. S.) of said county, granting to one Arthur Wright and his assigns the right for the period of fifty (50) years from and after the 1st day of May, 1903, to construct, erect, maintain and operate telephone lines and lines of telegraph under, upon, over and along the streets, alleys and public highways then or thereafter established within the area known as Cahuenga Valley Road District, in and of the plaintiff county. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit B." There have been received in evidence in this cause, marked respectively "Plaintiff's Exhibit C" and "Plaintiff's Exhibit D," a legal description and a map of said Cahuenga Valley Road District.

2. On or about the 7th day of May, 1903, said Arthur Wright assigned, transferred and conveyed all of his rights under said Ordinance No. 70 (N. S.) to one F. F. Graves.

3. On or about May 24, 1904, said F. F. Graves assigned, transferred and conveyed all of his rights under said Ordinance No. 70 (N. S.) to said Home of Los Angeles.

XVII

On or about the 29th day of June, 1903, the Board of Supervisors of plaintiff county adopted an ordinance, designated as Ordinance No. 77 (N. S.) of said county, granting to said Compton Home and its assigns the right for the period of thirty (30) years from and after the 21st day of July, 1903, to construct and operate telephone lines and lines of telegraph over and along the public streets, alleys and public highways of the plaintiff county within the voting precincts of Compton, Downey, Clearwater, Gardena, Wiseburn and Redondo Beach City. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit H."

XVIII

1. On or about the 31st day of May, 1904, the Board of Supervisors of the plaintiff county adopted an ordinance

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designated as Ordinance No. 108 (N. S.) of said county, granting to one Arthur Wright and his assigns the right for the period of thirty (30) years from and after the 21st day of June, 1904, to construct, maintain and operate telephone lines and lines of telegraph under, upon, over and along the streets, alleys and public highways of the plaintiff county, then or thereafter established, within the San Fernando, Los Angeles, Canada and Crescenta Road Districts as the same were then established. Copy of said ordinance has been received in evidence in this cause, marked "Plaintiff's Exhibit G." The boundaries of the area covered by said Ordinance No. 108 (N. S.) appear upon a transparency received in evidence herein and marked "Plaintiff's Exhibit M," for use as an overlay to the map received in evidence herein and marked "Plaintiff's Exhibit A."

2. Thereafter, and on or about the 1st day of October, 1904, said Arthur Wright assigned, transferred and conveyed all of his rights under said Ordinance No. 108 (N. S.) to San Fernando Home.

3. Thereafter, and on or about October 1st, 1918, by order and authority of said Railroad Commission, San Fernando Home transferred and conveyed all of its rights under said Ordinance 108 N. S. to said Pacific.

## XIX

1. On or about the 17th day of October, 1905, the Board of Supervisors of the plaintiff county adopted an ordinance, designated as Ordinance No. 129 (N. S.) in and of said county, granting to said Home of Los Angeles and its assigns the right and privilege for the period of thirty (30) years from and after the 1st day of November, 1905, to construct, maintain and operate a telephone and telegraph system under, upon and over the public streets, lanes, highways and places in that part of the plaintiff county lying outside of and immediately adjacent to the city of Los Angeles and within a radius of eight miles from the intersection of Ninth and Main Streets in said City. A copy of said ordinance has been received in evidence in this

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cause, marked "Plaintiff's Exhibit F." There has been received in evidence in this cause, marked "Plaintiff's Exhibit E," a map of the respective areas covered by said Ordinances No. 70 (N. S.) and 129 (N. S.).

2. Said Home of Los Angeles, on April 30, 1917, pursuant to the order and authority of said Railroad Commission, transferred and conveyed all of its rights under said ordinance to defendant.

XX

Each said corporate predecessor in interest of the defendant, and the defendant, respectively at all times held itself out as constructing, maintaining and operating, and each did construct, maintain and operate telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the incorporated and unincorporated areas of the plaintiff county, and as erecting poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or interfere with the navigation of such waters, pursuant to and in reliance upon the offer and tender of the right, privilege and franchise so to do by Section 536 of the Civil Code of the State of California; and each said corporate predecessor in interest of the defendant, and defendant, at all times openly and notoriously constructed its said lines and erected said poles, posts, piers and abutments for supporting said insulators, wires and other necessary fixtures of said lines, and claimed said right, privilege, authority and franchise so to do under and pursuant to said Section 536 of said Civil Code; that all of the facts stated in this paragraph were at all times well known to said plaintiff county and to its duly constituted officers.

XXI

Each said corporate predecessor in interest of the defendant, and defendant, at great cost and expense, respectively and successively enlarged, extended and improved its

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telephone and/or telegraph system to meet and supply the constantly increasing need and demand for telephone and telegraph service by the public, and respectively and successively constructed telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of the unincorporated area of said county, and erected poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters, and said construction and erection by each said corporate predecessor in interest of the defendant, and by the defendant, were made openly and notoriously and under and pursuant to the claim of right that under said Section 536 of said Civil Code of California each respectively and successively had the right, privilege, authority and franchise to construct telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the incorporated and unincorporated areas of the plaintiff county in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters. At all of said times the plaintiff county well knew of said claim of right by each said corporate predecessor in interest of the defendant, and by the defendant, and in all respects acquiesced therein, and recognized, acknowledged, conceded and agreed that each said corporate predecessor in interest of the defendant, and the defendant, respectively and successively had the said right, privilege, authority and franchise so respectively and successively claimed by it, and the plaintiff county did not in any wise interfere with, object to or (except as hereinafter found) question the exercise of said right, privilege, authority and franchise by either of said corporate predecessors in interest of the defendant, or by the defendant, respectively and successively, but on the contrary the plaintiff county, by its acquiescence aforesaid, induced each said corporate predecessor in interest of the defendant, and the defendant, to believe that the plaintiff county recog-

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nized, acknowledged, conceded and agreed that each said corporate predecessor in interest of the defendant, and the defendant, respectively and successively, had said right, privilege, authority and franchise as aforesaid. All of said telephone lines and lines of telegraph so constructed, and all of said poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines so erected by said corporate predecessors in interest of the defendant, and by the defendant, as hereinbefore found, were constructed and erected by them respectively in the belief, induced as aforesaid, that the plaintiff county recognized, acknowledged, conceded and agreed that said corporate predecessors in interest of the defendant, and the defendant, respectively and successively had said right, privilege, authority and franchise so respectively and successively claimed by each of them. The plaintiff county acquiesced, recognized, acknowledged, conceded and agreed as aforesaid with the intention that such acquiescence, recognition, acknowledgment, concession and agreement would be acted upon by said corporate predecessors in interest of the defendant, and by the defendant, respectively and successively, in so constructing said telephone lines and lines of telegraph, and in so erecting said poles, posts, piers and abutments; and said corporate predecessors in interest of the defendant, and the defendant, in constructing said telephone lines and lines of telegraph, and in erecting said poles, posts, piers and abutments, respectively and successively relied upon said acquiescence by the plaintiff county and its said recognition, acknowledgment, concession and agreement that said corporate predecessors in interest of the defendant, and the defendant, respectively and successively had said right, privilege, authority and franchise so claimed by them.

## XXII

1. Between on or about the 20th day of January, 1913, and on or about the 12th day of May, 1914, the Board of Supervisors of the plaintiff county considered the question whether the defendant's said corporate predecessor in interest, The Pacific Telephone and Telegraph Company, and

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other telephone and/or telegraph corporations respectively, had a franchise to use and occupy the public roads and highways of the unincorporated areas of the plaintiff county for their telephone lines or lines of telegraph, and the further question whether the defendant's said predecessor and such other corporations could be required by the plaintiff county to obtain from said county a franchise so to do. The fact that said Board of Supervisors had said questions under consideration came to the attention of the defendant's said predecessor on or about the 22nd day of January, 1913. During the time when said Board of Supervisors had said questions under consideration, as aforesaid, the plaintiff county refused to grant to the defendant's said predecessor, or to other such corporations, permits to make excavations in the public roads and highways of said county for the purpose of erecting their poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of their lines. On or about the 12th day of May, 1914, the said Board of Supervisors, duly assembled in meeting and acting upon the opinion and advice of the county Counsel of said county, concluded, decided and agreed that said Pacific and all other telephone and/or telegraph corporations which accepted and availed themselves of the right, privilege and franchise offered and tendered by Section 536 of the Civil Code of the State of California by constructing their telephone lines and/or lines of telegraph in such roads and highways, and rendered to the public telephone and/or telegraph service by means thereof, thereby become the owner of the franchise from the State of California, to so use and occupy and continue to use and occupy such roads and highways, and could not be required to obtain franchises from the said county so to do, but could only be required to obtain permits from said county to make excavations in the public roads and highways for the purpose of constructing thereon telephone lines and lines of telegraph and poles, posts, piers and abutments for supporting the insulators, wires and other fixtures of said lines along and upon said public roads and highways, pursuant to applications duly made for such permits pursuant to the ordinances of said county in these

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findings hereafter referred to. Thereupon, said county resumed the granting, and ever since said 12th day of May, 1914, has continued to grant, to the defendant's said predecessors in interest, and ever since the 30th day of April, 1917, has granted and continued to grant to defendant, permits to make such excavations for said purposes in such roads and highways in said county pursuant to applications therefor and without obtaining, from said county, any franchise so to use and occupy the said roads and highways for telephone lines and lines of telegraph.

2. On or about the 10th day of September, 1935, the County Auditor of the plaintiff county, by letter addressed to the Board of Supervisors of said county, advised said Board that he had notified the defendant that said Ordinance No. 129 (N.S.) of said county would expire on the 31st day of October, 1935, and suggesting that the defendant file application for a renewal of the franchise granted by said ordinance at an early date, and further advising that the defendant had acknowledged receipt of such notification and had stated that it had the matter under consideration. In and by said letter the said County Auditor suggested to said Board of Supervisors that it refer said matter to the County Counsel with instructions that he proceed against the defendant on November 1, 1935, in the event the defendant failed to make application for a renewal of said franchise. On or about September 16, 1935, said Board of Supervisors, duly assembled in meeting, ordered that the matter mentioned in said letter from said County Auditor be referred to the County Counsel with instructions to proceed against the defendant on November 1, 1935, in the event that the defendant failed to make application for a renewal of said franchise. On or about October 18, 1935, the defendant, by a letter to said County Auditor, advised him that the defendant would not apply for a renewal of said franchise, for the reason that it had been advised by its attorneys that it was fully invested with a franchise to maintain and operate its telephone lines and lines of telegraph along the public roads and highways and along and across the lands and waters in said county without such renewal.

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On or about the 29th day of October, 1935, the County Counsel of the said county advised said Board of Supervisors, in substance and effect, that the defendant was possessed of a franchise under Section 536 of the Civil Code of California to construct its telephone lines and lines of telegraph along and upon the public roads and highways of the plaintiff county and could not be required to obtain a franchise from said county so to do. (Copy of the letters hereinbefore mentioned in this paragraph have been received in evidence herein as parts of defendant's Exhibit 52.)

Upon receiving the said letter of October 29, 1935, from the County Counsel, the said Board of Supervisors, duly assembled in meeting, on or about November 12, 1935, ordered that the same be placed on file. The fact that said letters were written by the said County Auditor and the said County Counsel to the said Board of Supervisors, and the said actions taken by the said Board with reference thereto, came to the attention and knowledge of the defendant at or about the times when said letters were written and said actions taken respectively. On or about the 9th day of December, 1935, the said County Counsel advised said Board of Supervisors by letter, among other things, as follows:

> "Although the courts of this state have consistently recognized the statutory franchise of telephone and telegraph companies and have held that no franchise from a county is required, we think that for the protection of the interests of the taxpayers and in the effort to preserve this source of revenue if possible, an action would be justified. It is possible that we may be able to persuade our courts to reverse their decisions and adopt a different view of the law than they have maintained in the past, and as the privilege enjoyed by the telephone companies of operating in this county is a valuable one, some revenue should be forthcoming to the taxpayers therefrom if not barred by our Constitution and laws.
>
> "I am informed that there is at least one area in this county in which no franchise tax has ever been

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paid. May I suggest that this office be authorized to bring an action for accounting as to such area, and in conjunction therewith to bring either an action in quo warranto or for injunction—whichever may be the most efficacious remedy—to test the general power of the telephone companies to operate without a franchise from the county."

Upon receiving said last mentioned letter, and on or about December 9, 1935, said Board of Supervisors, duly assembled in meeting, authorized said County Counsel to bring an action for accounting as to area in the county in which no franchise had ever been paid, and in conjunction therewith to bring either an action in quo warranto or for injunction, to test the general power of telephone companies to operate without franchise from the county. (Copies of the said letter of the County Counsel, of December 9, 1935, and minutes of the Board of Supervisors at its meeting of December 9, 1935, taking the action aforesaid, have been received in evidence herein as parts of plaintiff's Exhibit R.) Neither the fact that said County Counsel had written said letter of December 9, 1935, nor the said action of the Board of Supervisors with reference thereto, ever came to the notice, knowledge or attention of the defendant until the trial of this cause.

3. At various times between said 19th day of May, 1905, and the date of the commencement of this action, the Board of Supervisors of plaintiff county passed and adopted successive ordinances regulating the making of excavations and fills and the doing of other work in the public highways of said county. Said successive ordinances included the following designated ordinances, to wit:

(a) Ordinance No. 133 (N.S.), entitled "An Ordinance regulating the making of excavations and fills and the doing of other work in public highways of the County of Los Angeles." Said ordinance was passed and adopted January 9, 1906, took effect on February 1, 1906, and continued in effect until June 1, 1909. A copy of said ordinance No. 133 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 1."

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(b) Ordinance No. 205 (N.S.), entitled "An Ordinance regulating the making of excavations, and fills, and the doing of other work in public highways of the County of Los Angeles." Said ordinance was passed and adopted May 10, 1909, took effect on June 1, 1909, and continued in effect until June 15, 1911. A copy of said ordinance No. 205 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 2."

(c) Ordinance No. 213 (N.S.), entitled "An Ordinance to amend Ordinance No. 205, new series, entitled 'An Ordinance regulating the making of excavations and fills and the doing of other work in public highways of the County of Los Angeles,' adopted May 10th, 1909." Said Ordinance No. 213 (N.S.) was passed and adopted June 28, 1909, and took effect on July 15, 1909. A copy of said ordinance No. 213 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 3."

(d) Ordinance No. 266 (N.S.), entitled "An Ordinance regulating the use of highways, traffic over the same, the making of excavations and fills and the doing of other public work thereon." Said ordinance was passed and adopted May 29, 1911, and took effect on June 15, 1911. A copy of said ordinance No. 266 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 4."

(e) Ordinance No. 372 (N.S.), entitled "An Ordinance prescribing the regulations under which permits shall be issued for the making of excavations and fills, and the performance of other work on public roads and highways within the County of Los Angeles." Said ordinance was passed and adopted September 29, 1914, and took effect on October 28, 1914. A copy of said ordinance No. 372 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 5."

(f) Ordinance No. 675 (N.S.), entitled "An Ordinance prescribing the regulations under which permits shall be issued for the making of excavations and fills, and the performance of other work on public roads and

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highways within the County of Los Angeles." Said ordinance was passed and adopted May 25, 1921, took effect on June 26, 1921, and ever since has been and now is in effect. A copy of said ordinance No. 675 (N.S.) has been received in evidence herein, marked "Defendant's Exhibit 6."

In substance, the provisions of each of said ordinances, material to this action, were as follows: Each of said ordinances prohibited the making of excavations and fills in public highways, or the traveled portion thereof, of said county, without first obtaining a permit therefor, as in said respective ordinance provided, from the Board of Supervisors or official of said county as specified in each respective ordinance; and each of said respective ordinances prescribed the manner of obtaining such permit, to wit, the filing with said Board of Supervisors, or with the other official of said county designated in said respective ordinance, of a written application describing specifically the location, nature and extent of the proposed work and the purposes thereof; and each of said ordinances, except said Ordinance No. 133 (N.S.), further provided that said application should show the nature of the right of the applicant to do such work, or to the use and occupancy, for the purpose mentioned in the application, of the highway wherein the excavation was proposed to be made, and that if it appeared that the applicant was lawfully entitled under any franchise to do such proposed work at the place and in the manner proposed, such board or official mentioned in each respective ordinance should grant a written permit to the applicant for the proposed work or such part thereof as it or he might find the applicant entitled to do.

On many hundreds of occasions during the period of time between said 19th day of May, 1905, and the date of the commencement of this action, the said several corporate predecessors in interest of the defendant, and the defendant, respectively and successively, made applications, pursuant to said respective ordinances hereinabove described, to the board or official specified in each such respective ordinance for permits to excavate in said public roads and highways for the purpose of erecting poles, posts, piers

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and abutments for supporting the insulators, wires and other necessary fixtures of their respective telephone lines and/or lines of telegraph. Said applications were made on printed forms prescribed and furnished by the plaintiff county, and in making said applications the said corporate predecessors in interest of the defendant, and the defendant, respectively and successively specified in the space provided in said forms for the specification of the applicant's right to occupy the highway for the purpose stated, said Section 536 of the Civil Code of the State of California; and each of said several applications was approved and permit granted pursuant thereto by the plaintiff county, and thereupon the plaintiff county issued and delivered to the respective corporation having made said application (being one of the said corporate predecessors in interest of the defendant, or the defendant, as the case might be) a permit in writing, duly executed by the official of the plaintiff county authorized to execute the same, by the terms of which the applicant was by the plaintiff county granted permission to make the excavation for which such permit was applied for, for the purpose of erecting such poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of said lines, with full knowledge on the part of the plaintiff county that the applicant (being one of the respective corporate predecessors in interest of the defendant, or the defendant, as the case might be) intended to erect said poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of its said lines, under and pursuant to its claim of right, privilege, authority and franchise under said Section 536 of said Civil Code, as aforesaid, and at no time did the plaintiff county refuse to grant any such permit upon the ground that the said corporate predecessors in interest of the defendant, or any of them, or the defendant, had no right, privilege, authority or franchise to construct, maintain and operate telephone lines and/or lines of telegraph or to erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their said lines along or upon such roads or highways.

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In reliance upon said permits, said respective corporate predecessors in interest of the defendant, and the defendant, respectively and successively, laid out large sums of money in constructing, maintaining and operating telephone lines and/or lines of telegraph and in erecting poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of their said telephone lines and/or lines of telegraph along and upon the public roads and highways in said county, and neither of the said corporate predecessors in interest of the defendant, nor the defendant, would have so laid out said large or any sums or sum of money unless they had respectively received said permits. Between and including the 18th day of July, 1910, and the 4th day of December, 1914, the plaintiff county, acting by and through its duly authorized officers and agents, issued and granted to said Pacific and to said Pasadena Home, each of which was and is a corporate predecessor in interest of the defendant, at least 173 such permits, pursuant to applications therefor duly made by said corporations respectively, as hereinbefore found. Between an unascertained date in the year 1914 and on or about the 2nd day of June, 1930, the plaintiff county, acting by and through its duly authorized officers and agents, issued to said The Pacific Telephone and Telegraph Company approximately 3458 such permits, in addition to those mentioned in the last preceding sentence hereof, pursuant to applications therefor duly made by said last mentioned corporation, as hereinbefore found. Between on or about the 30th day of April, 1917, and on or about the 10th day of July, 1941, the plaintiff county, acting by and through its duly authorized officers and agents, issued to the defendant approximately 7141 such permits, each pursuant to an application therefor duly made by the defendant, as hereinbefore found. Between said last mentioned date and the time of the trial of this cause the plaintiff county has continued to, and still and now does, regularly and in the due course of the administration of its affairs, issue such permits to the defendant pursuant to such applications therefor, duly made by the defendant, as hereinbefore found.

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4. On twenty-seven (27) separate occasions between and including the 23rd day of February, 1915, and the 25th day of May, 1937, said plaintiff county requested said Pacific, one of the corporate predecessors in interest of the defendant, and the defendant, respectively and successively, in connection with and because of street and highway improvement work undertaken by the plaintiff county, to relocate parts of their said respective telephone lines and lines of telegraph and some of their said poles, posts, piers, and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, which said Pacific and the defendant had respectively and successively constructed and erected along and upon the public roads and highways of the unincorporated area of the plaintiff county, and said Pacific and the defendant respectively and successively complied with said requests; and said requests were made by said county and complied with by said Pacific and by the defendant, as herein found, with full knowledge on the part of said county that said Pacific and the defendant respectively and successively claimed the right, privilege, authority, and franchise, under said Section 536 of the Civil Code of the State of California, to construct, maintain and operate their said respective telephone lines and lines of telegraph along and upon the public roads and highways of said state and of the unincorporated area of said county, and to erect their said respective poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, in such manner and at such points as not to incommode the public use of said roads or highways.

In most instances when such relocations were so required by the plaintiff county, said Pacific and the defendant respectively and successively made the same in the public roads and highways of said county under and pursuant to excavation permits issued by said county, in the form and of the character of the permits hereinbefore described; and each of said permits was issued following and pursuant to an application in writing made by said Pacific or by the defendant, as the case might be, specifying, in the space provided in said application for specification of the right of the applicant to occupy the highway for the purpose

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shown in the application, said Section 536 of the Civil Code of the State of California, as hereinabove found. In all other such instances the said county knowingly required and permitted said Pacific and the defendant, respectively and successively, to make such required relocations in the public roads and highways of said county without the formality of any such written permit and without the necessity on the part of either of said corporations of making any written application for any such permit.

5. Upon completion by the defendant, or by either of its said corporate predecessors in interest, as the case might be, of the work of locating or relocating any of its poles, posts, piers, abutments or other equipment or accessories for supporting the insulators, wires and other necessary fixtures of its lines of telegraph and/or telephone, pursuant to the said permits issued by the plaintiff county, as found in this paragraph XXII of these findings, the said completed work was inspected in each instance by a duly authorized officer or agent of the plaintiff county who reported his findings with regard thereto to the Road Department of said county. In no such case was it found or reported by such inspecting officer or agent of the plaintiff county that the place or manner of such installation or relocation was such as to incommode, obstruct or interfere with the public use of the road or highway in which the same was made. In each such case where the work authorized by any such permit involved breaking of the pavement or other surfacing of the traveled portion of any public road or highway by the defendant or either of its said corporate predecessors in interest, such work was inspected by an employee of said Road Department during its progress. In each such case of installation or relocation by the defendant or either of its said corporate predecessors in interest requiring restoration of such pavement or surfacing, such restoration was undertaken and completed by said Road Department. All costs and expenses of each such installation or relocation were borne and paid directly by the permittee in each such case, and all costs to the plaintiff county for such inspections and restorations of pavement or surfacing of roads and highways by said



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county or any of its officers or agents were reimbursed and paid to said county by the permittee in each such case.

6. On numerous occasions since on or about said 19th day of May, 1905, the plaintiff county successively requested said respective corporate predecessors in interest of the defendant, and the defendant, and still and now continues to request the defendant, to furnish to the said county telephone and telegraph service from and to various points in and outside of the unincorporated areas of said county by means of portions of the said telephone and telegraph system of said corporate predecessors in interest of the defendant, and of the defendant, situate in said unincorporated area of said county. The said corporate predecessors in interest of the defendant, and the defendant, in compliance with said requests, respectively and successively furnished, and defendant continues to furnish to said county telephone and telegraph service from and to various points in and outside of the unincorporated area of said county by means of said telephone and telegraph system of said corporate predecessors in interest of the defendant, and of the defendant, including the portions of said system situate in said unincorporated area of said county, and for that purpose said predecessors in interest of defendant from time to time constructed and maintained, defendant still and now constructs and maintains telephone lines and lines of telegraph along and upon the public roads and highways of said unincorporated area of said county, and poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, in such manner and at such points as not to incommode the public use of said roads or highways, and said predecessors in interest of defendant at all times have made available, respectively and successively, and defendant now makes available to said county telephone and telegraph service from and to all points in and outside of said unincorporated area of said county where the said corporate predecessors in interest of the defendant, and the defendant, respectively had or the defendant now has such telephone and telegraph service available, by means of said portions of said telephone and telegraph system of said corporate predecessors

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in interest of the defendant, and of the defendant. The plaintiff county made and continues to make said requests with full knowledge that in order to comply therewith it was and would be necessary for said corporate predecessors in interest of the defendant, and the defendant, respectively, to furnish and make available the service so requested over and by means of said telephone lines and lines of telegraph situate along the public roads and highways and along and across the lands and waters in said unincorporated area of said county, and for that purpose to construct, maintain and operate the necessary telephone lines and lines of telegraph along and upon said public roads and highways and along and across said lands and waters in said unincorporated areas of said county, and to erect along and upon said roads and highways and along and across said lands and waters the necessary poles, posts, piers, and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines. Such telephone and telegraph service was and continues to be requested by and was and continues to be furnished and made available to said county, and to be paid for by said county at the regular rates prescribed for such service by said Railroad Commission with full knowledge on the part of said county that each said corporate predecessor in interest of defendant, and defendant, respectively and successively claimed, and that the defendant continues to claim the right, privilege, authority and franchise under and pursuant to said Section 536 of the Civil Code of said state, to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the unincorporated area of said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters. All of the said telephone and telegraph service so rendered and furnished to the plaintiff county by the defendant and its said corporate predecessors in interest has been and is now used by the plaintiff

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county in and about the handling, carrying on, facilitation and expedition of its public business, affairs and functions, including particularly the public business, affairs and functions of its sheriff and other peace officers.

7. For each fiscal year including and between the fiscal year ending June 30, 1906, and the fiscal year ending June 30, 1935, excepting the fiscal years ending respectively June 30, 1907, June 30, 1916, June 30, 1919, June 30, 1921, June 30, 1922, and June 30, 1926, the plaintiff county assessed and levied respectively and successively against said corporate predecessors in interest of the defendant and against the defendant, for purposes respectively of Road Improvement Districts and Flood Control Districts in said county and for other purposes, taxes upon said franchise to use the public highways for the telephone lines and lines of telegraph by defendant and its said respective predecessors in interest; that said taxes were so levied and assessed with full knowledge that said franchise was the franchise claimed and held by said corporate predecessors in interest of the defendant, and by the defendant, respectively and successively, under and pursuant to said Section 536 of the Civil Code of the State of California; that each said corporate predecessor in interest of the defendant, and the defendant, respectively, paid all of said taxes so levied against them respectively as aforesaid. In levying and assessing said taxes, said county intended to tax and did tax the right, privilege, authority or franchise, under said Section 536 of said Civil Code, of the said corporate predecessors in interest of the defendant, and of the defendant, to construct telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters in said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires, and other necessary fixtures of their said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interfere with the navigation of such waters. The plaintiff county has not at any time returned or repaid, or tendered, offered or agreed to repay, either to the defendant or to any of its said corporate predecessors in interest so paying said taxes,

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any portion of the taxes so paid to and collected by the plaintiff county from the defendant and its said corporate predecessors in interest respectively.

8. The plaintiff county, by doing and performing the several acts, matters and things by it done and performed, as herein found, induced the respective corporate predecessors in interest of defendant, and defendant, to believe, and they and each of them were thereby induced by said acts, matters and things severally and in combination of any two or more of said acts, matters and things to, and each of said respective corporate predecessors in interest of defendant and defendant did, believe, that the plaintiff county acquiesced, recognized, acknowledged, conceded and agreed that the said corporate predecessors in interest of defendant, and defendant, respectively and successively, had the lawful right, privilege and franchise granted by said state under and pursuant to said Section 536 of said Civil Code to construct telephone lines and/or lines of telegraph along and upon the public roads and highways of this state and of the unincorporated areas of the plaintiff county and along and across the lands and waters of this state and of said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines, in such manner and at such points as not to incommode the public use of said roads or highways or to interrupt the navigation of said waters. Acting in reliance upon said belief, which it sincerely entertained in the exercise of its own counsels and in which belief it was confirmed, supported and encouraged by the conduct of plaintiff county as aforesaid, each said corporate predecessor in interest of defendant, and defendant, respectively and successively proceeded to and did at great cost and expense construct its said telephone lines and/or lines of telegraph along and upon the public roads and highways and along and across the lands and waters of this state and of the incorporated and unincorporated areas of the plaintiff county and proceeded to and did erect its poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines in said roads and highways and along and

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across said lands and waters in such manner and at such points as not to incommode the public use of said roads or highways or to interrupt the navigation of said waters, as hereinafter set forth.

## XXIII

1. In their said reliance and belief, sincerely entertained in the exercise of their own judgment and out of their own counsels, and in which belief they were confirmed, supported and encouraged by the plaintiff county as hereinbefore found, and pursuant to and in acceptance of the offer of right, privilege and franchise contained in and made by Section 536 of the Civil Code of California, each of said corporate predecessors in interest of the defendant, and the defendant, respectively and successively, continuously from and after the times when they respectively commenced to do business as hereinbefore found, extended its lines of telegraph and telephone lines and constructed, erected and from time to time acquired, by means of the outlay and expenditure of large sums of money, poles, conduits, wires and other parts, equipment and appurtenances of its said respective telephone and/or telegraph systems along and upon the public roads and highways and along and across the lands and waters within the incorporated and unincorporated areas of the plaintiff county.

2. Hereinafter in this subparagraph are set forth, as of and up to the respective dates specified, the number of miles of poles, conduits and wire so constructed, erected and acquired by said Pacific and said Home of Pasadena and by the defendant, respectively, in said unincorporated areas of the plaintiff county (see Defendant's Exhibits 54 and 55):

| Date | Name of Company | Miles of Poles | Number of Poles | Miles of Conduits | Miles of Wire |
|---|---|---|---|---|---|
| Dec. 31, 1910 | Pacific..... | 475 | ..... | None | 6,225 |
| Dec. 31, 1929 | Pacific..... | 430 | ..... | 42.32 | 41,712 |
| Dec. 31, 1925 | Home of Pasadena.... | 85.00 | ..... | 1.6 | 3,232 |
| Dec. 31, 1929 | Home of Pasadena.... | 96.0 | ..... | 3.6 | 5,550 |
| Dec. 31, 1917 | Defendant..... | 85.7 | ..... | 0.4 | 2,071.9 |
| Dec. 31, 1936 | Defendant..... | ..... | 30,954 | 574.00 | 316,619.5 |

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3. Up to and as of the 31st day of December, 1936, the total investment of the defendant in the operative properties of its said telephone and telegraph system in this state was the sum of $171,263,297.10 and its total investment in pole lines, cable, aerial wire and underground conduit was $73,429,561.05.
(See Defendant's Exhibit 49.)

4. Up to and as of the 31st day of December, 1936, the total investment of the defendant in pole lines, wire lines and underground conduit erected along and upon the public roads and highways and along and across the lands and waters in the unincorporated areas of the plaintiff county was as follows:

| | |
|---|---|
| Pole lines | $1,453,378.77 |
| Wire lines | 5,499,539.84 |
| Underground conduit | 1,201,701.87 |
| Total | $8,154,620.48 |

(See Defendant's Exhibit 50.)

## XXIV

1. The defendant has not at any time attempted to procure from the plaintiff county any franchise authorizing or permitting the defendant to construct, maintain or operate any telephone line, or any lines of telegraph, or to erect, construct or install any of the parts, appurtenances or fixtures of any such line in, upon or along any of the public roads or highways or along or across any of the waters of or within plaintiff county.

2. It is untrue that the defendant does not have, or that it has not had, a franchise covering or granting to it the right or privilege of constructing or maintaining its said or any telegraph and/or telephone line or system, or any poles, conduits, wires or other appurtenances employed in conjunction therewith, in, under, upon, over or along any portion of the streets, alleys or public highways of the plaintiff county.

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3. That at the time of the execution of the instrument of conveyance referred to in finding VIII, subdivision 2, and the instrument of conveyance referred to in finding XII, subdivision 1, no action had been taken by plaintiff or its Board of Supervisors to rescind or set aside or otherwise modify or nullify Ordinance No. 108 N. S. or the franchise described in said ordinance or to show or indicate that plaintiff considered that said ordinance and said franchise were not or that either thereof was not, in force and effect; and in so far as shown by the records of said county said ordinance and said franchise were in force and effect until the end of the period specified therein. That subsequent to the execution of the conveyance referred to in finding XII, subdivision 1, the defendant never at any time made any oral or written statement to the plaintiff whereby defendant expressly asserted to the plaintiff that defendant was exercising or was operating under, or because of, the franchise granted by said Ordinance No. 108 (New Series).

4. That at the time of the execution of the instrument or conveyance referred to in finding IX, subdivision 2, and the instrument of conveyance referred to in finding XII, subdivision 3, no action had been taken by plaintiff or its Board of Supervisors to rescind or set aside or otherwise modify or nullify Ordinance No. 77 N. S. or the franchise described in said ordinance or to show or indicate that plaintiff considered that said ordinance and said franchise were not or that either thereof was not, in force and effect; and in so far as shown by the records of said county said ordinance and said franchise were in force and effect until the end of the period specified therein. That subsequent to the conveyance referred to in finding XII, subdivision 3, the defendant never at any time made any oral or written statement to plaintiff whereby defendant expressly asserted to the plaintiff that defendant was exercising or was operating under, or because of, the franchise granted by said Ordinance No. 77 (New Series.)

5. That at the time of the execution of the conveyance referred to in finding XII, subdivision 4, no action had been

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taken by plaintiff or its Board of Supervisors to rescind or set aside or otherwise modify or nullify Ordinance No. 67 N.S. or the franchise described in said ordinance or to show or indicate that plaintiff considered that said ordinance and said franchise were not or that either thereof was not, in force and effect; and, insofar as shown by the records of said county said ordinance and said franchise were in force and effect until the end of the period specified therein. That subsequent to the execution of the conveyance referred to in finding XII, subdivision 4, the defendant never at any time made any oral or written statement to the plaintiff whereby said defendant expressly asserted to the plaintiff that defendant was exercising or was operating under, or because of, the franchise granted by said Ordinance No. 67 (New Series).

6. At all times since the defendant commenced to do business within the plaintiff county and elsewhere, as hereinbefore found and described, it has owned and exercised the right, privilege, authority and franchise to construct, maintain and operate telephone lines and lines of telegraph along and upon the public roads and highways and along and across the waters and lands within this state, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of its said lines, in such manner and at such points as not to incommode the public use of such roads or highways or interrupt the navigation of such waters, which right, privilege, authority and franchise were during all of said times and now are granted to and conferred upon it by Section 536 of the Civil Code of California.

7. It is not true that the defendant has at any time used or occupied or that it is now using or occupying any of the streets, alleys or public highways in any unincorporated or other area of the plaintiff county in dispensing or providing any type or kind of telephone and/or telegraph service in any manner whatsoever without any right or authority so to do. It is true that the defendant has not at any time paid to the plaintiff county any toll, rental, consideration or charge for such right or authority.

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XXV

1. That commencing on or about November 13, 1911, and annually thereafter until on or about April 30, 1917, the defendant's predecessor, Home Telephone and Telegraph Company, filed with the Board of Supervisors of the plaintiff, at the times and in the manner required by the terms of Ordinance No. 129 (New Series), a statement verified by the oath of one of its corporate officers, duly authorized to so act, to the effect that the payment which accompanied each such statement amounted to two per cent (2%) of the gross receipts of said company for the period named in said statement, derived by said company from its operations in the unincorporated area described in said franchise. That at or about April 30, 1917, the defendant filed with the Board of Supervisors of the plaintiff an executed copy of the instrument to show transfer of said franchise granted by said Ordinance No. 129 (New Series) from Home Telephone and Telegraph Company to the defendant; that thereafter annually the defendant filed with the Board of Supervisors of the plaintiff, at the times and in the manner required by the terms of said Ordinance No. 129 (New Series), a statement verified by the oath of one of its corporate officers, duly authorized so to act, to the effect that the payment which accompanied each such statement amounted to two per cent (2%) of the gross receipts of the defendant for the period named in said statement arising from defendant's operations in the unincorporated area described in said franchise, exclusive of the area within that covered by Ordinance No. 70 (New Series). That the statements and payments made by the defendant and its said predecessor in interest to the plaintiff as aforesaid were made annually for the period of time covered by said Ordinance No. 129 (New Series), which continued until October 31, 1935. That subsequent to October 31, 1935, no such statement or payment ever has been made by the defendant to the plaintiff under or by virtue of said Ordinance No. 129 (New Series) or any other ordinance or franchise, or otherwise, excepting only the payment of taxes by reason of the assessment against the defendant by the plaintiff on defendant's rights under Civil Code Section 536, termed a franchise by plaintiff's assessor, as herein else-

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where found. That the aggregate of all of the payments which accompanied the verified statements hereinabove mentioned, and which amounted to two per cent (2%) of the gross receipts from the operations hereinabove described, was approximately $291,000.00.

2. That in connection with the making and delivery of said statements and the making of the payments that accompanied them, and/or by said statements and said payments, no representation was made by the defendant or the Home Telephone and Telegraph Company except as hereinabove in this paragraph recited.

XXVa

That at all times mentioned in these findings, the defendant and its predecessors in interest have had access to the facts therein recited and to all facts involved in their respective relations to and transactions with the plaintiff equal to the access of the plaintiff; and that at all such times the defendant and its respective predecessors in interest have been as familiar with the facts involved in their respective relations to and dealings with the plaintiff as the plaintiff. That at all times when the defendant and/or its respective predecessors in interest claimed or asserted rights by virtue of Section 536 of the Civil Code of California, each of the corporations when it thus claimed or asserted such rights sincerely believed in the validity of said Section 536 of the Civil Code, and sincerely believed that it was entitled to the rights which it claimed or asserted by virtue of said section; and in entertaining those beliefs, each of said corporations relied on its own judgment and on its own private counsels, and relied also on the conduct of the plaintiff as herein in these findings recited, which conduct confirmed, supported and encouraged each of said corporations in said beliefs, and lulled said corporations respectively into a sense of security and confidence in their reliance on the validity of said Section 536 of the Civil Code.

XXVb

That no action has ever been taken by plaintiff or its Board of Supervisors rescinding, setting aside or otherwise

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modifying or nullifying Ordinance No. 70 (New Series) or the franchise described in said ordinance or to show or indicate that said ordinance or the franchise granted by said ordinance was not considered by plaintiff to be in force and effect; and insofar as shown by the records of said county, said ordinance still is in force and effect.

XXVI

Defendant intends to continue to use and occupy the public streets, alleys and highways of and within plaintiff county and elsewhere in the State of California for its telephone lines and lines of telegraph and to construct, erect, operate and maintain therein and thereupon its conduits, poles, wires and other appurtenances and fixtures of its said lines, all in the manner hereinbefore found and described, without having or procuring from the plaintiff county a franchise so to do.

It is not true that the plaintiff county is or has been, or that any of the inhabitants thereof are or have ever been, or that any part of the community thereof or of any community therein is now or has ever been, or that either or any of said parties are now being or will hereafter be damaged or injured, or threatened with damages or injury in any manner or to any extent or degree whatsoever by such use or occupancy of said streets, alleys and public highways or any thereof, or by the continuance of such use and occupancy by defendant.

XXVII

Neither defendant's said telephone lines or lines of telegraph nor any of the poles, posts, piers or abutments for supporting the insulators, wires or other fixtures of said lines do now, nor have they or either thereof at any time, or in any manner, or at any point, or at all, incommoded or threatened to incommode the public use of either or any of the public roads or highways, or interrupted or threatened to interrupt the navigation of any of the waters in said county;

Neither defendant's said telephone lines or lines of telegraph, nor any of the poles, posts, piers or abutments

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for supporting the insulators, wires or other fixtures of said lines are now, nor have they or either thereof at any time or in any manner or at any point or at all, been, nor do they or either thereof threaten to become, offensive to the senses, or an obstruction of the free use of property, or indecent or offensive to the senses so as to interfere with the comfortable enjoyment of life or property, nor do they or either thereof now obstruct or threaten to obstruct, nor have they or either thereof at any time or at all threatened to obstruct the free passage or use in the customary manner of any navigable lake or river, bay, stream, canal, or basin, or any public park, square, street or highway.

XXVIII

At all times since it started to do business as hereinbefore found, the defendant has received and now receives moneys from the operation (but not from the construction, erection or maintenance) of its said telegraph and telephone system. No evidence of the amount of such moneys has been offered herein. The defendant has refused and now refuses to account or report to the plaintiff county the amount of such moneys or any part thereof except as hereinbefore in these findings stated. Defendant has refused and now refuses to pay to the plaintiff any part of the moneys so received by defendant, except as to payments made during the time ending December 3, 1935, as hereinbefore stated in these findings. Plaintiff is ignorant of the amount of said moneys so received by the defendant. There is and has been no collusion between the plaintiff and the defendant.

XXIX

On or about the 2nd day of December, 1936, the Board of Supervisors of the plaintiff county, duly assembled in meeting, passed and adopted a resolution instructing and authorizing the County Counsel of said county to institute suit against the defendant to recover from the defendant an accounting as to and payment of two per cent (2%) of the gross annual receipts of the defendant arising from its construction, operation and maintenance of its telephone system and the conduits, poles, wires and other appurte-

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nances employed in conjunction therewith under, over, upon and along the streets, alleys and public highways of said county outside of the areas and the time covered by said Ordinance No. 70 (N. S.) and said Ordinance No 129 (N. S.) during the two years immediately prior to the passage and adoption of said resolution; and to procure an injunction permanently enjoining and restraining the defendant from constructing, maintaining or operating said telephone system and said conduits, poles, wires including said telephone lines and lines of telegraph and other appurtenances employed in connection therewith under, over, upon and along the streets, alleys and public highways of said county outside of the area covered by said Ordinance No. 70 (N. S.) unless and until the defendant shall have procured, in the manner prescribed by law, a franchise by the defendant county so to do, and to recover the costs of suit and such other and further relief as the court may allow.

*Conclusions of Law*

From the foregoing Findings of Fact the Court finds as Conclusions of Law as follows:

I

1. That at all times between the year 1889 and January 8, 1917, Sunset accepted, owned and exercised the valid franchise tendered and offered to it by Section 536 of the Civil Code to construct, maintain and operate its telegraph lines along and upon the public roads and highways and along and across the waters or lands within the State of California, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines;

2. That at all times between and including the 19th day of May, 1905, and said 8th day of January, 1917, Sunset accepted, owned and exercised the valid franchise tendered and offered to it by Section 536 of said Civil Code to construct, maintain and operate, and it did, pursuant to said franchise, lawfully construct, maintain and operate its lines of telegraph and telephone lines along and upon the

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public roads and highways and along and across the waters and lands within and throughout said state and within and throughout the county of Los Angeles, and erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines;

3. That continuously from the year 1889 until on and after the 19th day of May, 1905, Sunset was lawfully constructing, maintaining and operating its lines of telegraph along and upon the public roads and highways and along and across the waters and lands within and throughout the state of California and within and throughout the county of Los Angeles, and was lawfully erecting poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines under and pursuant to said valid franchise;

4. That from and after said 19th day of May, 1905, Sunset continued to lawfully construct, maintain and operate its lines of telegraph and its telephone lines along and upon said public roads and highways and along and across said lands and waters and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines under and pursuant to said valid franchise.

II

1. That continuously since and including the 2nd day of January, 1907, Pacific accepted, owned and exercised and still continues to accept, own and exercise the valid franchise tendered and offered to it by said Section 536 of said Civil Code to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the waters and lands within and throughout the State of California, and within and throughout the County of Los Angeles, and to erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of said lines;

2. That under and pursuant to said franchise so accepted and owned by it as aforesaid, Pacific has at all

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times since and including said 2nd day of January, 1907, lawfully occupied and used and continued to lawfully occupy and use the public roads and highways and the lands and waters of said state, including (until the 31st day of May, 1930) the public roads and highways and the lands and waters throughout said County of Los Angeles for its telephone lines and lines of telegraph and the poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures for said lines.

III

1. That continuously from and including the 19th day of May, 1905, Home of Los Angeles, USLD, Pasadena Home, Consolidated and each of said corporations, until and including the conveyances by each of said corporations to defendant as set forth in said findings, accepted, owned and exercised the valid franchise tendered and offered to each of said corporations respectively by Section 536 of the Civil Code to construct, maintain and operate telephone lines along and upon the public roads and highways and along and across any of the waters or lands within said state, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures in said lines in such a manner and at such points as not to incommode the public use of any such highway or to interrupt the navigation of any such waters;

2. That Compton Home accepted, owned and exercised said right and franchise tendered and offered to it by Section 536 of said Civil Code continuously from and including the 19th day of May, 1905, until the conveyance by said Compton Home to Consolidated, as set forth in said findings; and said Consolidated accepted, owned and exercised said franchise until the conveyance by Consolidated to defendant as set forth in said findings;

3. That said San Fernando Home accepted, owned and exercised said right and franchise tendered and offered to it by Section 536 of said Civil Code continuously from and including said 19th day of May, 1905, until the conveyance by it to Pacific as set forth in said findings;

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4. That each of said above named corporations during said respective times lawfully used and occupied and continued to lawfully use and occupy said public roads and highways and said lands and waters for its said respective telephone lines in and throughout the incorporated and unincorporated areas of the County of Los Angeles as set forth in said Findings under and pursuant to said valid franchise.

IV

1. That by the leases of January 2nd and October 17, 1907, and the conveyance of January 8, 1917, from Sunset to Pacific referred to in said Findings, the latter corporation succeeded to and became the owner of and thenceforward continued to lawfully exercise all of the rights of Sunset under and pursuant to said franchise granted by the State of California to said Sunset;

2. That by said conveyance of October 1st, 1918, from said San Fernando Home to Pacific, the latter succeeded to and became the owner of and thenceforward lawfully exercised all of the rights of said San Fernando Home under and pursuant to said franchise granted by said State of California to said San Fernando Home;

3. That by said respective conveyances of April 30, 1917, from Pacific and Home of Los Angeles to defendant, the latter succeeded to and became the owner of and thenceforward continued to lawfully exercise all of the rights of said Pacific and Home of Los Angeles, respectively, under and pursuant to said franchises so granted to said Pacific and to said Home of Los Angeles by said State of California as aforesaid, in and throughout the areas described and set forth in said respective conveyances;

4. That by said conveyances of May 31, 1930, from said Pacific, USLD, Pasadena Home, and Consolidated to defendant the latter succeeded to and became the owner of and continuously thenceforward has lawfully exercised and still continues to exercise all of the rights of said four last named corporations, and each of them, under and pursuant to said respective franchises granted to said respec-



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tive four last named corporations by said State of California as aforesaid;

5. That defendant is now and at all times since the 30th day of April, 1917, has been the owner of and has lawfully exercised and is now lawfully exercising the right and franchise lawfully granted by the State of California to it, to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across any of the waters or lands within and throughout the State of California, including said County of Los Angeles, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other necessary fixtures of said lines.

V

That defendant's telephone lines and lines of telegraph are now and at all times since the 30th day of April, 1917, have been lawfully along and upon the public roads and highways and along and across the waters and lands within said County of Los Angeles under and pursuant to said valid franchise.

VI

None of the telephone lines or lines of telegraph of said defendant nor any of the poles, posts, piers or abutments for supporting the insulators, wires or other fixtures of said lines is or ever has been or has at any time threatened nor do they or either of them threaten to be or become a public nuisance, or any nuisance whatever.

VII

That at the time of the commencement of this action and for many years prior thereto it was and still is the rule under the statutes of the State of California, and under the decisions of the courts of said state that Section 536 of the Civil Code extended and offered and extends and offers a valid grant of the right, privilege, authority and franchise described therein to any telegraph or telephone corporation accepting the same, and that the acceptance

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of such grant by a telegraph or telephone corporation by the construction of telephone lines or lines of telegraph along and upon the public roads or highways of said state, and the rendition of telephone and telegraph service to the public by means of such lines, creates a vested right in such accepting telegraph or telephone corporation in and to such right, privilege, authority or franchise; that said rule now constitutes and for many years has constituted, a rule of property, and said rule of property was, at the time of the commencement of this action, and for many years prior thereto had been in full force and effect; that under said rule of property defendant acquired and owns and has the right, privilege, authority and franchise and has at all times since the 30th day of April, 1917, had the right, privilege, authority and franchise to construct, maintain and operate telephone lines and lines of telegraph along and upon the public roads and highways of said state and of the incorporated and unincorporated areas of the County of Los Angeles, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other fixtures of the lines in such manner and at such points as not to incommode the public use of said roads or highways.

VIII

That plaintiff is estopped to deny or question the right, privilege, authority and franchise of defendant to construct, maintain and operate its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters in said county, and to erect poles, posts, piers and abutments for supporting the insulators, wires and other fixtures of its said lines in such manner and at such points as not to incommode the public use of such roads or highways or interrupt the navigation of any such waters.

That plaintiff county is estopped as against defendant to maintain, or assert that Section 536 of the Civil Code or any part or provision thereof violates or contravenes any part or provision of the Constitution of the State of California.



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IX

That neither said Sunset nor said Pacific nor said USLD nor said Home of Los Angeles nor said Pasadena Home nor said San Fernando Home nor said Compton Home nor said Consolidated Utilities nor said defendant waived, abandoned or surrendered said franchise offered and tendered by the State of California to telephone and telegraph corporations by said Section 536 of said Civil Code, and owned by each of said corporations as aforesaid.

X

That said franchise so tendered and offered to telephone and telegraph corporations by said Section 536 of the Civil Code as aforesaid, and accepted and owned respectively as aforesaid by said Sunset, and by said Pacific, and by said USLD, and by said Home of Los Angeles, and by said Pasadena Home, and by said San Fernando Home, and by said Compton Home, and by said Consolidated Utilities and by defendant as set forth in said Findings constituted and constitutes, and at all times from the respective dates of the commencement of the construction and operation of telephone and/or telegraph lines by said respective corporations, has constituted, a contract by and with the State of California, with each of said corporations, secured by the Constitution of the United States against impairment by any state, county or other law or regulation;

That under and by said contract said State, in consideration of each of said telephone and telegraph corporations constructing, maintaining and operating its telephone and/or telegraph lines as authorized by said Section 536 of said Civil Code, and rendering to the public telephone and telegraph services by means thereof, granted to, and each of said telephone and telegraph corporations became the owner of, the right, privilege and franchise to construct, maintain and operate, and to continue to construct, maintain and operate, its telephone lines and lines of telegraph along and upon the public roads and highways and along and across the lands and waters of said state and to erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of said lines in such manner and at such points as not to incommode the

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public use of said roads or highways or to interfere with the navigation of said waters;

That defendant, in its own right and as successor in interest to said Sunset, Pacific, USLD, Home of Los Angeles, Pasadena Home, San Fernando Home, Compton Home and Consolidated Utilities, as in said Findings set forth, was, at the time of the commencement of this action and for many years prior thereto had been, and still continues to be the owner of and exercising said right, privilege and franchise.

XI

That the alleged cause of action set forth in said complaint is barred by laches of plaintiff in the premises,

XII

That plaintiff is entitled to take nothing by this action.

XIII

That defendant is entitled to judgment herein.

Dated December 18, 1944.

William J. Palmer, Judge.

(Endorsed): No. 410067. Findings of Fact and Conclusions of Law. Filed Dec. 18, 1944. J. F. Moroney, County Clerk. By W. L. Goff, Deputy.

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## APPENDIX "D"

Civ. No. 14915

County of Los Angeles, Appellant,

*vs.*

Southern California Telephone Company, a Corporation, Respondent

This is an action in equity by which the county seeks an adjudication that the telephone company must procure a franchise from the county in order to make use of the highways for the operation of its system in unincorporated

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areas of the county. The action seeks, for the past, an accounting for the usable value of the defendant's alleged unauthorized occupancy of such highways, and for the future, an injunction to restrain the telephone company from occupying the highways unless it procures a county franchise. The complaint denominates the defendant's occupancy of county highways as "obstructing the free passage and use in the customary manner by the plaintiff," etc., and as constituting "a public and common nuisance injuriously affecting the property of the plaintiff," etc.

The answer denies obstruction and nuisance, and alleges that the defendant and its predecessors have continuously maintained telephone and telegraph lines throughout the eight southernmost counties since 1889, making use of the highways in connection therewith by virtue of the express provisions of section 536 of the Civil Code. Estoppel and laches are also pleaded by alleging facts showing recognition by the appellant county of the telephone company's rights, over a long period of years. At the trial appellant's attorney renounced any "intention of proving or attempting to prove that . . . the structures are so located that they constitute a nuisance in fact," basing the county's claim upon the theory that the respondent's use of the highways for its poles, wires, etc., was unauthorized.

The primary question, according to appellant's brief, relates to the constitutionality of section 536 of the Civil Code. In addition to maintaining that this section is valid and constitutes a state franchise authorizing use of the highways, respondent contends that with the appellant's renunciation of the nuisance theory adopted in its complaint, no judicial controversy remained. Respondent further asserts that this suit in equity cannot be converted into a quo warranto proceeding and that appellant is not authorized to maintain such a proceeding. It is the respondent's position that by section 536 "the State has left nothing to be granted by a county in respect to franchises to corporations for telegraph and telephone purposes."

Section 536 of the Civil Code, as amended to 1905, reads as follows:

"Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any

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public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

The section as originally placed in the Civil Code in 1872, applied only to telegraph corporations. It is conceded by the appellants that if section 536 grants a valid franchise, the respondent company has done those things necessary to the procurement of such franchise. During the trial the court rendered an opinion upholding the constitutionality of this section; thereafter evidence was introduced, and the present appeal is from a judgment in favor of the telephone company.

The appellant county maintains that section 536 is invalid in that it amounted to a legislative "grant" of a valuable franchise "without any consideration whatsoever except the operation of a private enterprise for private profit . . . in violation of sections 22 and 31 of Article IV of the State Constitution. It follows that the purported 'grant' was a nullity, that the Telephone Company has had no 'franchise' and that it needs a franchise from the County under the Broughton Act."

Section 22 of article IV of the Constitution of 1879 provided that "no money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution, *nor shall any grant or donation of property ever be made thereto by the state;* . . ." (Italics added.)

Section 31 of article IV of the Constitution makes the further limitation that the Legislature shall have no "power to make any *gift or authorize the making of any gift,* of any public money *or thing of value* to any individual, municipal or other corporation whatever; . . ." (Italics added.)

The respondent asserts that the above constitutional provisions were not intended to "forbid the lending of the use of the public highways for and in consideration of the establishment of a public service," and that the decisions

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of this state over a period of more than forty years, have clearly recognized the validity of section 536 of the Civil Code granting telephone and telegraph corporations the use of all public highways. In reference to these California decisions it is the appellant's contention that "nowhere in the opinion of any one of those cases did the Court before which the case was pending pass upon the constitutionality of section 536 in the light of sections 22 and 31 of Article IV of our State Constitution . . . The validity of section 536 . . . was apparently conceded by every party and assumed by the Court."

Among other cases cited by respondent is *Western Union Telegraph Co.* v. *Hopkins*, 160 Cal. 106, 118, where the court said: "In the light of what we have said, it appears that the case of *Western Union Tel. Co.* v. *Visalia*, 149 Cal. 744, does necessarily decide that section 536 of the Civil Code was effectual to grant this right as to all highways lying outside of municipalities, . . . Section 536 . . . has, however, never been confined in terms to highways outside of municipalities, but always purported to apply to all public highways in the state." And on page 119 it is said: "It is earnestly urged . . . that section 536 of the Civil Code is either unconstitutional or cannot be construed as it was in the Visalia case, . . . Assuming that section 536 of the Civil Code was a grant of the right to such use of the streets, we are of the opinion that it must be held, to use the language of the United States circuit court of appeals in *Sunset Tel. & Tel. Co.* v. *Pomona*, 172 F. 837, that the maintenance and operation of such system 'was an acceptance by it of the provisions of that statute, which thereby became a contract between the company and the state, secured by the constitution of the United States against impairment by any subsequent legislation.'"

Although this and other cases hold that the right conferred by section 536 is a "vested" one, it should be noted that this is not an *unqualified* right; the county still has control over the manner of its exercise. Said the court in the *Western Union Telegraph Co.* v. *Hopkins* case at page 121: "Of course, the liability of plaintiff to all such reasonable regulations as is warranted in the proper exercise of the police power cannot be disputed. In fact this is ex-

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pressly stipulated by the provisions in section 536 of the Civil Code, that the system of the telegraph company must be constructed 'in such manner and at such points as not to incommode the public use of the road or highway.' "

The franchise to use the public highways, granted by section 536, has been held taxable for state and county purposes in the county of Los Angeles. (*Western Union Tel. Co.* v. *Hopkins,* 160 Cal. 106; *Western Union Tel. Co.* v. *County of Los Angeles,* 160 Cal. 124; *Postal Tel.-Cable Co.* v. *County of Los Angeles,* 160 Cal. 129; see, also, *Postal Tel.-Cable Co.* v. *City of Los Angeles,* 164 Cal. 156.

The case of *City of Beverly Hills* v. *City of Los Angeles,* 175 Cal. 311, has been particularly commented upon by both parties. Prior to the incorporation of Beverly Hills, the city of Los Angeles had acquired the right to construct a water pipe-line along public roads subsequently included in the city limits of Beverly Hills, by accepting the grant made by the Act of April 11, 1911 (Stats. 1911, p. 852; Deering's Gen. Laws, Act 5194) of the right to so use roads situated in unincorporated territory. At page 315 of the Beverly Hills case, the court says: "*No doubt exists as to the power of the state to make the grant,* which, when accepted as we have seen, constituted an inviolable contract the extent of which is measured by the purpose for which it was intended, and in the exercise of which right defendant was limited alone by the language used in the grant." (Italics added.) See, also, *State* v. *Marin M. Water District,* 17 Cal. 2d 699.

Appellant's contention that the telephone company is obliged to obtain a county charter under the provisions of the Broughton Act, warrants consideration of the case of *County of Inyo* v. *Hess,* 53 Cal. App. 415, 424, where the court says: "Our conclusions are . . . third, that under and by virtue of the provisions of section 536 of the Civil Code, telephone corporations are granted the right and privilege to use the public highways over which to construct and operate lines of telephone wires, free from any grant made by subordinate legislative bodies, and *unrestricted by the provisions of the Broughton Act,* . . . ." (Italics added.) A petition for hearing in the Supreme Court, was denied.

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Section 536 also received consideration in *Postal Tel.-Cable Co.* v. *Railroad Commission*, 200 Cal. 463, 472, where the court held that "This section constitutes a grant of a franchise which the state offered, and petitioner accepted by the construction of its lines. The rights acquired . . . are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision." The Railroad Commission could not, therefore, demand a certificate of public convenience and necessity from petitioner before it could carry on its intrastate business.

In a recent case not cited by either party thereto,—*City of Salinas* v. *Pacific Tel. & Tel. Co.* (January, 1946) 72 A.C.A. 652, 655, the court again adhered to the views expressed in earlier California cases and said: "The purpose of the 1905 change was to add *telephone lines* and *telephone corporations* to the section (Civ. Code § 536). . . . The section has been construed as a continuing offer by the state to all telegraph and telephone companies to use without compensation such public highways as may be convenient or necessary for the operation of their lines (*Postal-Telegraph Cable Co.* v. *Los Angeles*, 164 Cal. 156)."

A survey of the cases previously mentioned and others cited by appellant and respondent clearly indicates that, as stated by the trial judge in the instant case, "the Supreme Court of California, consistently whenever opportunity has presented itself, has dealt with section 536 of the Civil Code as a valid, constitutional enactment." And, in the language of respondent's brief,—"Appellant not only asks the court to turn its back upon these settled doctrines, but to reverse a series of its own decisions covering more than forty years. . . . Therein statutes have been recognized and acted upon as valid and Constitutional and thereunder untold millions have been expended in the establishment and maintenance of indispensable public services."

In *Miller & Lux* v. *Enterprise Canal & Land Co.*, 142 Cal. 208, 215, answering an assault upon the constitutionality of a code provision, the court said: "And although the point of the unconstitutionality of the section may not heretofore have been expressly raised and decided, still we think the

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*principle* of the rule of *stare decisis* should apply, . . . ." The court held that the power there in question "has been continuously recognized and declared by this court for too long a period of time to be now questioned." There is similar expression by Justice Brewer in voicing a concurring opinion in *Western Union Tel. Co.* v. *Pennsylvania R. R. Co.*, 195 U. S. 540, 593: "When this court has construed a statute . . . and that construction has remained for more than a quarter of a century, neither changed by any judicial decisions or set aside by any Congressional legislation, it ought not to be disturbed except for the most cogent reasons."

Since acceptance by the telephone company of the provisions of section 536 of the Civil Code, has been held to effect a contractual relation between company and state (*Western Union Tel. Co.* v. *Hopkins*, 160 Cal. 106, and other cases previously cited), the familiar principle, often announced, and stated again recently in *Hill* v. *Fowble*, 65 Cal. App. 2d 25, 30, may be noticed; namely that "The practical construction placed on a contract by the parties, by their conduct and actions in executing it, is often considered strong evidence of what was intended by its provisions." The trial court in the instant case correctly held that "This principle applies with extraordinary force and appropriateness to Section 536, Civil Code, in respect to which, since the adoption of the Constitution, and until the preliminaries of filing of the instant suit, the practical construction adopted by the state in all departments called upon to construe the section and its relationship to the Constitution has been uniform, and consistent with the validity of the section." Not only this, but the appellant county has apparently acquiesced in this view by way of its answers filed in the Western Union cases hereinbefore mentioned, and otherwise. Respondent further calls attention to the fact, not denied in appellant's brief, that "As late as 1935 efforts of appellant to have it (Section 536) repealed were turned down by the legislature." These matters, it should be noted, are not referred to as bearing upon estoppel or laches alleged by appellant to bar consideration of the constitutional question, the decision of which question is not deemed necessary herein. They are merely mentioned in reference

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to the practical construction of section 536 over a period of many years, as shown by the acts of the parties in connection therewith. While not controlling in reference to the present controversy, such construction is not without value.

Although it is doubtless true, as urged in appellant's brief, that a decision upholding the validity of a statute does not preclude the same court from later declaring the statute unconstitutional upon grounds other than those urged in the first case, such doctrine standing alone cannot support appellant's present contention. Indeed, no pertinent case has been cited which would justify this court in declaring section 536 invalid. On the contrary, what authority there is, fully supports the finding of the trial court. As said in *Lacy* v. *Gunn*, 144 Cal. 511, 514, "the question would seem to be foreclosed by the previous decisions of this court *recognizing the validity, . . . While its constitutionality has not been discussed, section 1 of the act has been treated as valid* and its provisions enforced by the court. . . . These decisions have been generally considered and acted upon as judicial recognitions of the validity of the section, . . . ." (Italics added.)

In view of the opinion expressed herein, and of the appellant's frank concession that "it has no case at all if section 536 is constitutional," there is no need to consider the other issues in the case.

The judgment is affirmed.

DORAN, J.

I concur.
YORK, P. J.
WHITE, J.



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